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No.

In the Supreme Court of the United States

JOHN F. KELLY, SECRETARY OF
HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

BRYAN WILCOX, ACTING FIELD OFFICE DIRECTOR,
ET AL., PETITIONERS

v.

BASSAM YUSUF KHOURY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.

PARTIES TO THE PROCEEDING

Petitioners in *Preap* were appellants in the court of appeals. They are John F. Kelly, in his official capacity as Secretary of Homeland Security; Jefferson B. Sessions III, in his official capacity as Attorney General of the United States; David W. Jennings, in his official capacity as U.S. Immigration and Customs Enforcement (ICE) San Francisco Field Office Director; Gregory J. Archambeault, in his official capacity as ICE San Diego Field Office Director; and David A. Marin, in his official capacity as ICE Acting Los Angeles Field Office Director.

Petitioners in *Khoury* were appellants in the court of appeals. They are Bryan Wilcox, in his official capacity as Acting ICE Field Office Director; Lowell Clark, in his official capacity as Warden of the Northwest Detention Center; Juan P. Osuna, in his official capacity as Director of the Executive Office of Immigration Review; Jefferson B. Sessions III, in his official capacity as Attorney General of the United States; John F. Kelly, in his official capacity as Secretary of Homeland Security; Thomas D. Homan, in his official capacity as Acting Director, ICE; and the United States of America.[*]

Respondents in *Preap* were appellees in the court of appeals. They are Mony Preap, Eduardo Vega Padilla, and Juan Lozano Magdaleno, for themselves and on behalf of a class of similarly situated individuals.

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[*] In both cases, John F. Kelly and Jefferson B. Sessions III are automatically substituted for their respective predecessors. See Sup. Ct. R. 35.3. In *Preap*, David W. Jennings is substituted for his predecessor, and in *Khoury*, Bryan Wilcox and Thomas D. Homan are substituted for their predecessors. See *ibid.*

Respondents in *Khoury* were appellees in the court of appeals. They are Bassam Yusuf Khoury, Alvin Rodriguez Moya, and Pablo Carrera Zavala, for themselves and on behalf of a class of similarly situated individuals.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases. They raise the identical question. Sup. Ct. R. 12.4.

OPINIONS BELOW

The opinion of the court of appeals in *Preap* (App., *infra*, 1a-57a) is reported (without the appendices) at 831 F.3d 1193. The opinion of the court of appeals in *Khoury* (App., *infra*, 58a-59a) is not published in the *Federal Reporter* but is reprinted at 667 Fed. Appx.

966. The opinion of the district court in *Preap* (App., *infra*, 60a-106a) is reported at 303 F.R.D. 566. The opinion of the district court in *Khoury* (App., *infra*, 107a-138a) is reported at 3 F. Supp. 3d 877.

JURISDICTION

In both *Preap* and *Khoury*, the judgment of the court of appeals was entered on August 4, 2016, and a petition for rehearing was denied on January 11, 2017 (App., *infra*, 139a-140a). On April 7, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 141a-146a.

STATEMENT

These cases present the question whether a criminal alien in removal proceedings becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after he is released from criminal custody, the Department of Homeland Security (DHS) does not take him into immigration custody immediately.

A. Legal Framework

1. In 8 U.S.C. 1226(c), Congress mandated that DHS detain certain criminal and terrorist aliens during their removal proceedings, without the potential for release on bond. Congress enacted Section 1226(c) "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003).

Section 1226(c) consists of two paragraphs. The first directs the Secretary of Homeland Security to take into custody certain criminal and terrorist aliens:

> The [Secretary[1]] shall take into custody any alien who—
>
> > (A) is inadmissible by reason of having committed any offense covered in [8 U.S.C. 1182(a)(2)],
> >
> > (B) is deportable by reason of having committed any offense covered in [8 U.S.C. 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)],
> >
> > (C) is deportable under [8 U.S.C. 1227(a)(2)(A)(i)] on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
> >
> > (D) is inadmissible under [8 U.S.C. 1182(a)(3)(B)] or deportable under [8 U.S.C. 1227(a)(4)(B)],
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. 1226(c)(1). The referenced sections render aliens deportable or inadmissible because of certain criminal offenses or terrorist acts. The two class actions that are included in this petition take it as a given that class members are removable under those provisions.

Paragraph (2) is entitled "Release," and it provides that the Secretary "may release an alien described in paragraph (1) only if" a narrow witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2). The class actions here take it as a given that this exception does not apply. Respondents are therefore subject to mandatory detention, without bond, if each is an "alien described in paragraph (1)" of Section 1226(c). *Ibid.*

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[1] Congress has transferred to the Secretary the enforcement of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq*. *E.g.*, 6 U.S.C. 202(3), 557; 8 U.S.C. 1103(a)(1).

2. The Board of Immigration Appeals (BIA) has interpreted the phrase an "alien described in paragraph (1)," concluding that an alien fits within the meaning of that phrase if he is deportable or inadmissible under any of the four lettered subparagraphs. *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc). Under the BIA's interpretation, the flush paragraph beginning "when the alien is released" does not "describe[]" an alien, but rather identifies when the Secretary's duty is triggered, and thus does not limit paragraph (2)'s prohibition against release during removal proceedings. *Ibid.* Specifically, the BIA held in *Rojas* that an alien who has been convicted of a predicate offense does not become exempt from the detention mandate if he "is not immediately taken into custody by [DHS]." *Ibid.* The BIA explained that the phrase "an alien described in paragraph (1)" is ambiguous, as it does not state "whether it encompasses the 'when the alien is released' clause," or "merely references the four categories of aliens described in subparagraphs (A) through (D)." *Id.* at 120. After reviewing the statute's text, context, and history, as well as practical considerations, the BIA concluded that it would be "inconsistent with our understanding of the statutory design to construe [Section 1226(c)] in a way that permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension

by [DHS]." *Id.* at 124. The BIA instead concluded that the "when the alien is released" clause defines when DHS's duty to take a criminal alien into custody is triggered. *Ibid.*

B. Facts And Procedural History

1. *The* Preap *case.* On December 12, 2013, the *Preap* respondents brought a putative class action in the United States District Court for the Northern District of California. The court certified a class consisting of all aliens in California "who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the government immediately upon their release from criminal custody for a Section 1226(c)(1) offense." App., *infra*, 8a. The *Preap* respondents contended that they were exempt from mandatory detention under Section 1226(c), notwithstanding that they had committed a specified predicate offense, on the theory that Section 1226(c)(2)'s detention mandate does not apply unless DHS takes the alien into custody "when the alien is released." *Id.* at 3a-4a.

On May 15, 2014, the district court entered a preliminary injunction in favor of the *Preap* respondents. App., *infra*, 60a-106a. The court agreed with the *Preap* respondents' interpretation of Section 1226(c), held that the class members were exempt from mandatory detention because they had not been taken into immigration custody "immediately," and it entered a preliminary injunction requiring the government to provide bond hearings to all class members. *Id.* at 61a, 95a, 105a-106a.

The court of appeals affirmed. App., *infra*, 1a-57a. The court recognized that four of its sister circuits had considered the issue and "sided with the government" by ruling that a gap in custody is irrelevant. *Id.* at 4a;

see *Lora* v. *Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015);[2] *Olmos* v. *Holder*, 780 F.3d 1313, 1324-1327 (10th Cir. 2015); *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 161 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375, 382-384 (4th Cir. 2012); see also *Castañeda* v. *Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (dividing evenly on the question whether a criminal alien becomes exempt after a multiple-year delay). The court nonetheless rejected that position and declined to accord deference to the BIA's decision in *Rojas*. Instead, the court held that the "when the alien is released" clause in Section 1226(c)(1) unambiguously exempts a criminal alien from mandatory detention unless he is taken into custody "promptly" upon his release. App., *infra*, 3a. The court also rejected the government's argument under *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003), and *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-720 (1990), that, even if the "when the alien is released" clause mandates action by DHS within a specified time, the government's failure to take the alien into custody until later does not preclude it from relying on the bar to release in Section 1226(c)(2). App., *infra*, 23a-27a; but see

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[2] The government filed a petition for a writ of certiorari in *Lora* on the question whether a criminal alien becomes exempt from mandatory detention under Section 1226(c) if his removal proceedings last six months. See Pet. i, No. 15-1205 (Mar. 25, 2016). The government suggested that the petition be held pending this Court's decision in *Jennings* v. *Rodriguez*, No. 15-1204 (argued Nov. 30, 2016), and the government's petition in *Lora* remains pending. The Court denied a conditional cross-petition in *Lora* presenting the question here: whether a criminal alien is exempt from mandatory detention if DHS does not take him into immigration custody immediately upon his release from criminal custody. See 136 S. Ct. 2494 (2016) (No. 15-1307). At that time, no circuit conflict existed.

Sylvain, 714 F.3d at 160-161 (accepting this argument); *Hosh*, 680 F.3d at 382 (same).

2. *The* Khoury *case*. On August 1, 2013, the *Khoury* respondents brought a putative class action in the United States District Court for the Western District of Washington, raising the same argument that criminal aliens become exempt from detention under Section 1226(c) if DHS does not take them into custody immediately. The court certified a class consisting of all aliens in the Western District "who were subjected to mandatory detention under 8 U.S.C. § 1226(c) even though they were not detained immediately upon their release from criminal custody." App., *infra*, 58a-59a. And the court granted summary judgment to the respondents, declaring that Section 1226(c) "applies only to aliens who are detained immediately upon their release from criminal custody." *Id.* at 59a.

The government appealed, and the court of appeals affirmed. App., *infra*, 58a-59a. The court relied on its decision in *Preap*, issued the same day. *Ibid.*

3. The government filed petitions for rehearing en banc in both *Preap* and *Khoury*, which the court of appeals denied. App., *infra*, 139a-140a.

REASONS FOR GRANTING THE PETITION

This Court should grant the government's petition for a writ of certiorari because the Ninth Circuit has created a circuit conflict on an important and recurring issue of federal law: whether a criminal alien becomes exempt from mandatory detention under Section 1226(c) if DHS does not take him into immigration custody immediately when he is released from criminal custody. As the Ninth Circuit itself acknowledged, App., *infra*, 4a, four courts of appeals have held that the answer is no; the Ninth Circuit is the only court of appeals to hold that the answer is yes.

The Ninth Circuit's decision not only created a lopsided circuit conflict, but it also is wrong. Paragraph (2) of Section 1226(c) prohibits the Secretary from releasing any "alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). And paragraph (1) describes aliens based on their criminal history: It provides that the Secretary must take into custody "any alien who" is inadmissible or deportable because of certain criminal offenses or terrorist conduct. 8 U.S.C. 1226(c)(1)(A)-(D). Therefore, "any alien who" is removable because of a predicate offense is subject to mandatory detention. The further phrase "when the alien is released" in paragraph (1) simply identifies when the Secretary's duty to take the alien into custody is triggered. At most, Section 1226(c) is ambiguous in this respect, and the BIA has held that a gap between criminal and immigration custody is irrelevant. See *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc). That decision warrants deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and is correct even without it.

The question presented has considerable practical importance. Under the Ninth Circuit's rule, many criminal aliens will become exempt from mandatory custody for a reason—a gap in custody—that is "irrelevant for all other immigration purposes" and often outside DHS's control. See *Rojas*, 23 I. & N. Dec. at 122. Moreover, some significant portion of criminal aliens who obtain bond hearings will be released on bond then will flee or reoffend, thereby causing precisely the problems

Congress enacted Section 1226(c) to prevent. This Court should grant certiorari and reverse.

I. The Court Of Appeals' Decisions Are Wrong

The BIA's interpretation of Section 1226(c) in *Rojas* warrants *Chevron* deference, and is correct even without it. First, as the BIA concluded, the phrase "an alien described in paragraph (1)" is most naturally read to refer "to an alien described by one of four subparagraphs, (A) through (D)." 23 I. & N. Dec. at 121. Those subparagraphs describe characteristics of the alien based on *the alien's own conduct* that sensibly warrant mandatory detention during removal proceedings: his commission of a qualifying criminal offense or terrorist act. And as a matter of grammar, those subparagraphs naturally describe who such an alien is: "any alien who * * * is inadmissible" or "who * * * is deportable" for one of the enumerated reasons. 8 U.S.C. 1226(c)(1). By contrast, the phrase that follows—"when the alien is released"—takes as a given that "the alien" has already been described. *Ibid.* That clause instead thus defines when an *action of the Secretary* should occur, and paragraph (1) provides what that action is: The Secretary "shall take into custody" such an alien "when the alien is released." *Ibid.*[3] Accordingly, DHS has an obligation under paragraph (1) to take a covered criminal alien into custody "when the alien is released," and under paragraph (2) must in any event detain a covered criminal alien during his removal proceedings without regard to whether custody began immediately.

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[3] Paragraph (1) is also ambiguous with respect to whether "when the alien is released" means "at or around the same time," or "in the event that." See *Webster's Third New International Dictionary* 2602 (1993) (defining "when" as "at or during the time that," "just after the moment that," "at any and every time that," and "in the event that"); see also *United States* v. *Willings & Francis*, 8 U.S. (4 Cranch) 48, 55 (1807) (Marshall, C.J.) ("That the term may be used, and, either in law or in common parlance, is frequently used in the one or the other of these senses, cannot be controverted; and, of course, the context must decide in which sense it is used in the law

A practical example illustrates the structural point. If somebody gave you a two-paragraph shopping list saying "(1) Pick up milk, eggs, and cheese when the groceries are available for sale at the store"; and "(2) refrigerate the groceries described in paragraph (1)," no sensible person would believe that, if you did not pick up the milk, eggs, or cheese until long after the store opened, you could leave them out on the counter rather than put them in the refrigerator. Here, Congress's use of lettered subparagraphs to enumerate which criminals and terrorists the Secretary should take into custody makes the statute somewhat more dense, but it does not alter this basic structural point. And although Congress could have referred to aliens "described in subparagraphs (A) through (D) of paragraph (1)" instead of aliens "described in paragraph (1)," "Congress has not always been consistent in how it refers to other subsections in the same statute." *Olmos* v. *Holder*, 780 F.3d 1313, 1320 (10th Cir. 2015). "For example, in 8 U.S.C. § 1153(b)(5)(B)(i), Congress referred broadly to 'subparagraph (A)' even though the context showed that Congress was referring to only two subparts of 'subparagraph (A)': (i) and (ii)." *Ibid.*

Second, interpreting "when the alien is released" as triggering DHS's duty to take a qualifying alien into immigration custody, rather than circumscribing the class

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under consideration."); *Hosh* v. *Lucero*, 680 F.3d 375, 379-380 (4th Cir. 2012) (finding "when" in Section 1226(c) to be ambiguous).

of qualifying aliens, is consistent with the statutory context and purpose. Congress enacted Section 1226(c)'s mandate of detention "against a backdrop of wholesale failure by the [government] to deal with increasing rates of criminal activity by aliens," and to ensure that aliens would appear at their removal proceedings and that the government would be able to remove them once a final removal order was entered. *Demore* v. *Kim*, 538 U.S. 510, 513, 518-520 (2003) (discussing evidence of recidivism and flight among criminal aliens). "Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Rojas*, 23 I. & N. Dec. at 122. Many provisions of the immigration laws in turn are "aimed at expediting the removal of aliens, and that is especially true for criminal aliens such as those who fall within subparagraphs (A) through (D)." *Id.* at 121. By contrast, the Ninth Circuit's reading of Section 1226(c) would undermine Congress's overarching purpose by exempting serious criminals from mandatory detention, and it would do so based on a factor—whether there is a gap in custody—that "is irrelevant for all other immigration purposes." *Id.* at 122.

Third, the BIA's construction of Section 1226(c) as mandating detention without regard to a gap in custody is supported by this Court's precedent establishing that statutes providing that "the Government 'shall' act within a specified time, without more," are not "jurisdictional limit[s] precluding action later." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003). For example, in *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), this Court held that, even if the government fails to comply with a statutory mandate that a judicial officer "shall" hold a bail hearing "immediately" upon a criminal defendant's first appearance in court, the government may still detain that person before trial. *Id.* at 717-718. Otherwise, "every time some deviation from the strictures" of the statute occurs, it would "bestow upon the defendant a windfall" and "visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants." *Id.* at 720. So too here. The Ninth Circuit's interpretation "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline," and thus would "reintroduce[] discretion into the process and bestow[] a windfall upon dangerous criminals." *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 160-161 (3d Cir. 2013).

"Finally, the BIA's interpretation has the added benefit of accounting for practical concerns arising in connection with enforcing the statute." *Lora* v. *Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015). "As the BIA explained in *Rojas*, '[i]t is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [DHS] to appear at the jailhouse door to take custody of an alien at the precise moment of release.'" *Ibid.* (brackets in original) (quoting *Rojas*, 23 I. &. N. Dec. at 128). "Particularly for criminal aliens in state custody," the Second Circuit has explained, "it is unrealistic to assume that DHS will be aware of the exact timing of an alien's release from custody, nor does it have the resources to appear at every location where a qualifying alien is being released." *Id.* at 612-613.

Indeed, gaps in custody are often caused by reasons outside DHS's control. To facilitate its efforts to take criminal aliens into custody, U.S. Immigration and Customs Enforcement (ICE) often sends requests to state or local jurisdictions to notify it in advance when a particular criminal alien will be released from custody, and often sends requests that the custodian hold the alien in custody for up to 48 hours to enable ICE officers to effectuate an arrest. See 8 C.F.R. 287.7(a) and (d). State and local jurisdictions do not always cooperate with those requests, however. For example, ICE reported in fiscal year 2016 that its enforcement and removal officers "documented a total of 21,205 declined detainers in 567 counties in 48 states including the District of Columbia between January 1, 2014, and September 30, 2016." *ICE Enforcement and Removal Operations Report Fiscal Year 2016*, at 9. "Declined detainers result in convicted criminals being released back into U.S. communities," thus creating gaps in custody "notwithstanding ICE's requests for transfer of those individuals." *Ibid.* The Ninth Circuit's interpretation thus would frustrate DHS's ability to remove deportable criminal aliens from the United States, in contravention of Congress's basic purpose.

II. The Court Of Appeals' Decisions Create A Circuit Conflict On An Important And Recurring Issue Of Federal Law

1. The Ninth Circuit's decisions in these cases create a conflict with the decisions of every other circuit to decide the same question. As the Ninth Circuit recognized, the Second, Third, Fourth, and Tenth Circuits have held that a criminal alien does not become exempt from mandatory detention when there is a gap in custody, even when it lasts multiple years. App., *infra*, 4a; see *Lora*, 804 F.3d at 611; *Sylvain*, 714 F.3d at 161;

Hosh v. *Lucero*, 680 F.3d 375, 382-384 (4th Cir. 2012); *Olmos*, 780 F.3d at 1324-1327. The Ninth Circuit expressly rejected that position. It held that a criminal alien is exempted from mandatory detention if DHS does not take him into custody "promptly," and it affirmed class-action injunctions that exempt criminal aliens who DHS does not take into custody "immediately." App., *infra*, 6a, 28a, 59a. The Ninth Circuit thus opened an acknowledged conflict with the decisions of four circuits.

As the Ninth Circuit noted, its sister circuits adopted somewhat different rationales. See App., *infra*, 4a. Three circuits (the Second, Fourth, and Tenth) deferred to the BIA's interpretation of Section 1226(c) in *Rojas*. See *Lora*, 804 F.3d at 610-613; *Hosh*, 680 F.3d at 380-381; *Olmos*, 780 F.3d at 1316. As an additional or alternative rationale, all four circuits (the Second, Third, Fourth, and Tenth) relied on the *Montalvo-Murillo* line of cases to reason that, even if Section 1226(c) directs the government to act within a specified time, the criminal alien would not become exempt from mandatory detention if the government failed to act until later. See *Lora*, 804 F.3d at 612; *Sylvain*, 714 F.3d at 157-161; *Hosh*, 680 F.3d at 381-383; *Olmos*, 780 F.3d at 1325-1326. The Ninth Circuit, however, rejected both arguments: It declined to defer to the BIA's interpretation in *Rojas*, and it held that the *Montalvo-Murillo* line of cases was inapposite. App., *infra*, 12a-13a. And most fundamentally, the Ninth Circuit's bottom line is different from that of four other circuits.

The Ninth Circuit also denied the government's petitions for rehearing en banc in *Preap* and *Khoury*. App., *infra*, 139a-140a. The conflict therefore will persist absent this Court's review.

2. No other circuit court has adopted the Ninth Circuit's position. The Ninth Circuit found persuasive Judge Barron's opinion for three members of the First Circuit in *Castañeda* v. *Souza*, 810 F.3d 15 (2015) (en banc). See App., *infra*, 5a ("We agree with Judge Barron and his two colleagues."). But as the Ninth Circuit recognized, *id.* at 5a n.4, Judge Barron's views did not command a majority in *Castañeda*. Rather, the en banc First Circuit divided evenly. That case involved the question of whether a criminal alien becomes exempt from mandatory detention after a break in custody that lasted multiple years. Three judges concluded that a criminal alien becomes exempt if DHS does not take him into custody "within a reasonable time frame," and that a multiple-year delay was unreasonable, *Castañeda*, 810 F.3d at 38, 42 (opinion of Barron, J.). The remaining three judges concluded that the gap was irrelevant to the custody mandate. See *id.* at 47, 58 (opinion of Kayatta, J.). The First Circuit accordingly does not have binding circuit precedent as to whether a criminal alien becomes exempt after a multiple-year gap.[4]

3. The question presented here not only divides the circuits, but also has considerable practical importance. Removing deportable criminal aliens has long been a top priority of immigration enforcement. *E.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. F, Tit. II, 129 Stat. 2497 (prioritizing the identification and removal of criminal aliens by the severity of their

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[4] The First Circuit has definitively rejected, however, a bright-line rule that a criminal alien becomes exempt when there is a gap in custody of a mere 48 hours. See *Gordon* v. *Lynch*, 842 F.3d 66, 70 (2016) ("[A] class-wide, bright line rule of a mere 48 hours, with no mention of an alien's potential culpability for delay, is inconsistent with the reasoning and logic of both *Castañeda* opinions.").

crimes); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. D, Tit. II, 122 Stat. 3659 (same). The Ninth Circuit's decisions will impede DHS's efforts to remove criminal aliens, and lead to the very problems that Congress enacted Section 1226(c) to prevent. Congress enacted Section 1226(c) to deny certain deportable criminal aliens the opportunity for release on bond during their removal proceedings, based on real-world experience that, when such aliens were given bond hearings, they were too often released and "continue[d] to engage in crime and fail[ed] to appear for their removal hearings in large numbers." *Demore*, 538 U.S. at 513; see *id.* at 518-520 (discussing evidence of flight and recidivism). The Ninth Circuit's interpretation, however, ensures that many criminal aliens who committed predicate offenses nonetheless will be given bond hearings, and a significant portion of those will be released, thus creating the very risk of recidivism and flight that Section 1226(c) would otherwise foreclose.

Furthermore, as a practical reality, gaps in custody are inevitable due to resource constraints and DHS's incomplete information regarding when particular criminal aliens will be released. See pp. 12-13, *supra.* Indeed, gaps in custody often occur notwithstanding DHS's efforts to request the needed information from the state or local custodian (or to request that the state or local jurisdiction temporarily hold the alien to enable DHS to effectuate an arrest). See *ibid.* The Ninth Circuit's interpretation thus will frustrate DHS's ability to remove deportable criminal aliens from the United States, and frustrate Congress's purpose of ensuring that removable criminal aliens are unable to flee or reoffend during their removal proceedings.

4. Finally, these cases provide an ideal vehicle because the question here is squarely presented in both. Indeed, in each case, it is the only question: A district court entered an injunction in a broad class action exempting criminal aliens from mandatory detention under Section 1226(c) on the basis that DHS did not take them into custody "immediately." App., *infra*, 8a, 58a-59a. And in each case, the court of appeals affirmed by holding that Section 1226(c) exempts criminal aliens from mandatory detention if DHS does not take them into immigration custody "promptly." *Id.* at 3a, 59a. Accordingly, if this Court were to hold that the timing of custody is irrelevant or that there is no immediacy or promptness exception, the court of appeals' decision would be reversed and the injunctions vacated.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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MAY 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-16326 and 14-16779
D.C. No. 4:13-cv-05754-YGR

MONY PREAP; EDUARDO VEGA PADILLA; JUAN LOZANO MAGDALENO, PLAINTIFFS-APPELLEES

v.

JEH JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; LORETTA E. LYNCH, ATTORNEY GENERAL; TIMOTHY S. AITKEN; GREGORY ARCHAMBEAULT; DAVID MARIN, DEFENDANTS-APPELLANTS

Argued and Submitted: July 8, 2015
Seattle, Washington
Filed: Aug. 4, 2016

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

OPINION

Before: ANDREW J. KLEINFELD, JACQUELINE H. NGUYEN, and MICHELLE T. FRIEDLAND, Circuit Judges.

NGUYEN, Circuit Judge:

Every day in the United States, the government holds over 30,000 aliens in prison-like conditions while determining whether they should be removed from the country.[1] Some are held because they were found, in a bond hearing, to pose a risk of flight or dangerousness. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d). Others, however, are held without bond because they have committed an offense enumerated in a provision of the Immigration and Naturalization Act ("INA"). 8 U.S.C. § 1226(c). Aliens in this latter group are subject to the INA's mandatory detention provision, which requires immigration authorities to detain them "when [they are] released" from criminal custody, 8 U.S.C. § 1226(c)(1), and to hold them without bond, 8 U.S.C. § 1226(c)(2). A broad range of crimes is covered under the mandatory detention provision, from serious felonies to misdemeanor offenses involving moral turpitude and simple possession of a controlled substance. 8 U.S.C. §§ 1226(c)(1)(A)-(D).

This mandatory detention provision has been challenged on various grounds. *See, e.g., Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding the constitutionality of the provision against a due process challenge); *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-81 (9th Cir. 2015) (*Rodriguez III*), *cert. granted sub nom.*, *Jennings v. Rodriguez*, No. 15-1204, 2016 WL 1182403 (June 20, 2016) (holding that detainees are entitled to a bond hearing after spending six months in custody).[2] Here, we are faced with another such challenge; this time, regarding the meaning of the phrase "when [they are] released" in § 1226(c)(1), and whether it limits the category of aliens subject to detention without bond under § 1226(c)(2). Specifically, we must decide whether an alien *must* be detained without bond even if he has resettled into the community after release from criminal custody. If the answer is no, then the alien *may* still be detained, but he may seek release in a bond hearing under § 1226(a) by showing that he poses neither a risk of flight nor a danger to the community.

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[1] U.S. Immigration and Customs Enforcement, ERO Facts and Statistics 3 (2011), http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf.

Addressing this issue requires us to consider the interaction of the two paragraphs of the mandatory detention provision, 8 U.S.C. § 1226(c). Paragraph (1) requires the Attorney General ("AG") to "take into custody any alien who [commits an offense enumerated in subparagraphs (A)-(D)] when the alien is released [from criminal custody]." 8 U.S.C. § 1226(c)(1). Paragraph (2) prohibits the release of "an alien described in paragraph (1)" except in limited circumstances concerning witness protection. 8 U.S.C. § 1226(c)(2). Plaintiffs argue that the phrase "when . . . released" in paragraph (1) applies to paragraph (2) as well, so that an alien must be held without bond only if taken into immigration custody promptly upon release from criminal custody for an enumerated offense. The government, by contrast, argues that "an alien described in paragraph (1)" is any alien who commits a crime listed in §§ 1226(c)(1)(A)-(D) regardless of how much time elapses between criminal custody and immigration custody. According to the government, individuals not detained "when . . . released" from criminal custody as required by paragraph (1) are still considered "alien[s] described in paragraph (1)" for purposes of the bar to bonded release in paragraph (2).

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[2] For a detailed history of decisions from the Supreme Court and this court dealing with the various immigration detention statutes, see *Rodriguez III*, 804 F.3d at 1067-70.

To date, five of our sister circuits have considered this issue, and four have sided with the government. Significantly, however, there is no consensus in the reasoning of these courts. The Second and Tenth Circuits found that the phrase "an alien described in paragraph (1)" was ambiguous, and thus deferred to the BIA's interpretation of the phrase to mean "an alien described in subparagraphs (A)-(D) of paragraph (1)." *See Lora v. Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015) ("Consistent with *Chevron*, we are not convinced that the interpretation is 'arbitrary, capricious, or manifestly contrary to the statute.'" (quoting *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012))); *Olmos v. Holder*, 780 F.3d 1313, 1322 (10th Cir. 2015) ("The text, the statutory clues, and canons of interpretation do not definitively clarify the meaning of § 1226(c)."). The Fourth Circuit has held that "when . . . released" means any time after release, but it did so under a misconception that the BIA had so interpreted the phrase.[3] *Hosh v. Lucero*, 680 F.3d 375, 380-81 (4th

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[3] As other circuits have recognized, the BIA has never formally interpreted the phrase "when the alien is released." *See, e.g.*, *Sylvain v. Atty Gen. of United States*, 714 F.3d 150, 157 n.9 (3d Cir. 2013) ("The specific term interpreted in *Rojas* is the phrase 'an alien described in paragraph (1).'"). In fact, far from interpreting the phrase in the manner suggested by the Fourth Circuit, the BIA has said in passing that "when . . . released" does require immediacy. *In re Rojas*, 23 I. & N. Dec. 177, 122 (BIA 2001) ("The

Cir. 2012). Finally, the Second, Third, and Tenth Circuits applied the loss-of-authority rule, finding that the AG's duty to detain criminal aliens under § 1226(c)(1) continues even if the government fails to comply with the "when . . . released" condition. *See, e.g., Sylvain v. Atty Gen. of United States*, 714 F.3d 150, 157 (3d Cir. 2013) (holding that "[e]ven if the statute calls for detention 'when the alien is released,' and even if 'when' implies something less than four years, nothing in the statute suggests that immigration officials lose authority if they delay"); *see also Lora*, 804 F.3d at 612; *Olmos*, 780 F.3d at 1325-26.

On the other hand, the government's position has been rejected by most district courts to consider the question and, most recently, by three of six judges sitting en banc in the First Circuit.[4] *See Castañeda v. Souza*, 810 F.3d 15, 18-43 (1st Cir. 2015) (en banc) (Barron, J.). In an opinion written by Judge Barron, these three judges concluded that the statutory context and legislative history make clear that aliens can be held without bond under § 1226(c)(2) only if taken into immigration custody pursuant to § 1226(c)(1) "when . . . released" from criminal custody, not if there is a lengthy gap after their release. *See id.* at 36, 38.

We agree with Judge Barron and his two colleagues. The statute unambiguously imposes mandatory detention without bond only on those aliens taken by the AG into immigration custody "when [they are] released"

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statute does direct the [AG] to take custody of aliens immediately upon their release from criminal confinement.").

[4] Because the First Circuit split evenly on the question, its opinions are not binding on lower courts. The district court's judgments were affirmed. *Castañeda*, 810 F.3d at 19.

from criminal custody. And because Congress's use of the word "when" conveys immediacy, we conclude that the immigration detention must occur promptly upon the aliens' release from criminal custody.

I.

The named Plaintiffs in this case are lawful permanent residents who have committed a crime that could lead to removal from the United States. Plaintiffs served their criminal sentences and, upon release, returned to their families and communities. Years later, immigration authorities took them into custody and detained them without bond hearings under § 1226(c). Plaintiffs argue that because they were not detained "when . . . released" from criminal custody, they were not subject to mandatory detention under § 1226(c).[5]

Mony Preap, born in a refugee camp after his family fled Cambodia's Khmer Rouge, has been a lawful permanent resident of the United States since 1981, when he immigrated here as an infant. He has two 2006 misdemeanor convictions for possession of marijuana. Years after being released at the end of his sentences for these convictions, Preap was transferred to immigration detention upon serving a short sentence for simple battery (an offense not covered by the mandatory detention statute) and held without a bond hearing. Since the instant litigation began, Preap has been granted cancellation of removal and released from immigration custody.[6]

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[5] Plaintiffs raised both a statutory challenge and a Due Process challenge before the district court. The district court resolved the case on statutory grounds, and thus did not reach the Due Process question. *Preap v. Johnson*, 303 F.R.D. 566, 574 n.5 (N.D. Cal. 2014). Neither do we.

Eduardo Vega Padilla has been a lawful permanent resident since 1966, shortly after he came to the United States as an infant. Padilla also has two drug possession convictions—one from 1997 and one from 1999—and a 2002 conviction for owning a firearm with a prior felony conviction. Eleven years after finishing his sentence on that last conviction, he was placed in removal proceedings and held in mandatory detention. Padilla eventually obtained release after receiving a bond hearing under our decision in *Rodriguez v. Robbins* (*Rodriguez II*), 715 F.3d 1127, 1144 (9th Cir. 2013), in which we held that the government's detention authority shifts from § 1226(c) to § 1226(a) after a detainee has spent six months in custody; *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-81 (9th Cir. 2015) (*Rodriguez III*), *cert. granted sub nom.*, *Jennings v. Rodriguez*, No. 15-1204, 2016 WL 1182403 (June 20, 2016).

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[6] The district court rejected the government's argument that Preap's cancellation of removal mooted his claim, and the government has not challenged that determination. We agree that the claims of the named Plaintiffs on behalf of the class are not mooted by Plaintiffs' release from detention or termination of removal proceedings because the claims are "transitory in nature and may otherwise evade review." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090-91 (9th Cir. 2011); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (explaining when a "claim on the merits is 'capable of repetition, yet evading review,' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation" (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975))); *Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014) (holding that Article III justiciability requirements were satisfied despite the expiration of the named plaintiff's claim for injunctive relief).

Juan Lozano Magdaleno has been a lawful permanent resident since he immigrated to the United States as a teenager in 1974. Magdaleno has a 2000 conviction for owning a firearm with a prior felony conviction, and a 2007 conviction for simple possession of a controlled substance. He was sentenced to six months on the possession charge and released from jail in January 2008. Over five years later, Magdaleno was taken into immigration custody and held without bond pursuant to § 1226(c). He also was later released from detention following a *Rodriguez* hearing.

These three Plaintiffs filed a class action petition for habeas relief in the Northern District of California. The district court granted their motion for class certification, certifying a class of all "[i]ndividuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the government immediately upon their release from criminal custody for a Section 1226(c)(1) offense." The district court also issued a preliminary injunction requiring the government to provide all class members with bond hearings under § 1226(a).[7] *Preap v. Johnson*, 303 F.R.D. 566, 571, 584 (N.D. Cal. 2014). This appeal followed.

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[7] The district court held that if the named Plaintiffs prevailed in their interpretation of § 1226(c), then they would have met their burden under all four prongs of the preliminary injunction test set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). The government has waived any challenge to that determination by declining to dispute it on appeal.

II.

We have jurisdiction to review this class action habeas petition under 28 U.S.C. § 1291. The jurisdiction-stripping provision of 8 U.S.C. § 1226(e), which bars judicial review of discretionary agency decisions regarding immigrant detention, does not bar us from hearing "challenges [to] the statutory framework that permits [petitioners'] detention without bail." *Demore v. Kim*, 538 U.S. 510, 517 (2003). We review questions of statutory construction de novo. *United States v. Bert*, 292 F.3d 649, 651 (9th Cir. 2002).

III.

The government's authority to detain immigrants in removal proceedings arises from two primary statutory sources.[8] The first, 8 U.S.C. § 1226(a), grants the AG discretion to arrest and detain any alien upon the initiation of removal proceedings.[9] Under this provision, the AG may then choose to keep the alien in detention, or allow release on conditional parole or bond. 8 U.S.C. § 1226(a)(1)-(2).[10] If the AG opts for detention, the alien may seek review of that decision at a hearing before an immigration judge ("IJ"), 8 C.F.R. § 236.1(d)(1), who may overrule the AG and grant release on bond, *id.* § 1003.19. The alien bears the burden of proving his suitability for release, and the IJ should consider whether he "is a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk." *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); *see also* 8 § C.F.R. 1236.1(c)(8).

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[8] Other provisions of the Immigration and Nationality Act (INA) govern the detention of individuals considered "applicants for admission," *see* 8 U.S.C. § 1225(b), or those awaiting deportation after entry of a final order of removal, *see* 8 U.S.C. § 1231(a), among other categories. These detention provisions are not implicated here.

[9] The Homeland Security Act of 2002, Pub. L. No. 107-296 § 471, 116 Stat. 2135 (2002), moved many immigration enforcement responsibilities from the Department of Justice to the Department of Homeland Security. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003). Because the statute at issue refers to the Attorney General, we will continue to do so here.

[10] The discretionary detention provision reads as follows:

The second provision is 8 U.S.C. § 1226(c), the mandatory detention provision at issue in this case. Importantly, this provision operates as a limited exception to § 1226(a). *See* 8 U.S.C. § 1226(a). ("Except as provided in subsection (c) of this section . . . "). Section 1226(c) reads as follows:

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on –

  (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

  (B) conditional parole[.]

8 U.S.C. § 1226(a).

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

> The Attorney General may release **an alien described in paragraph (1)** only if the Attorney General decides pursuant to [the Federal Witness Protection Program] that release of the alien from custody is necessary . . . [and] the alien will not pose a danger to . . . safety

> . . . and is likely to appear for any scheduled proceeding.

8 U.S.C. § 1226(c) (emphases added) (footnote omitted). We must decide the proper scope of this mandatory detention exception, and specifically whether it applies to aliens who are not promptly placed in removal proceedings upon their release from criminal custody for an offense listed in § 1226(c)(1)(A)-(D).

The government advances three arguments to support its view that Plaintiffs are subject to mandatory detention under § 1226(c). First, it argues that we should give *Chevron* deference, as have the Second and Tenth Circuits, to the BIA's interpretation that the phrase "an alien described in Paragraph (1)" means "an alien described in subparagraphs (A)-(D) of paragraph (1)," thus subjecting all criminal aliens who have committed one of the listed crimes to mandatory detention regardless of when they were taken into immigration custody. *See In re Rojas*, 23 I. & N. Dec. 117, 121 (BIA 2001). Second, the government argues that we should follow the Fourth Circuit in holding that "when . . . released" is a duty-triggering clause, not a time-limiting clause, and that, as such, it merely informs the AG when the duty to detain arises, not when the duty must be performed. *Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012).[11] Third, the government argues that we should follow the Second, Third, and Tenth Circuits in holding that, even if Congress intended that immigration authorities promptly detain criminal aliens when they are released from criminal custody, Congress did not clearly intend that they would lose the authority to do so in the event of delay.

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[11] The Fourth Circuit incorrectly attributed this interpretation to the BIA. *See Hosh*, 680 F.3d at 380 (reasoning that the phrase "when . . . released" is ambiguous and deferring to the BIA's "permissible construction").

We find all three arguments unpersuasive. We agree with Judge Barron and his colleagues on the First Circuit in *Castañeda*, 810 F.3d at 19, that the government's positions contradict the intent of Congress expressed through the language and structure of the statute.

A.

We first address the government's argument that we should defer to the BIA's interpretation of § 1226(c)(2)'s phrase "an alien described in paragraph (1)" to mean "an alien described in subparagraphs (A)-(D) of paragraph (1)." *See Rojas*, 23 I. & N. Dec. at 125 ("We construe the phrasing 'an alien described in paragraph (1),' as including only those aliens described in subparagraphs (A) through (D) of section [(c)(1)], and as not including the 'when released' clause."). Under this interpretation, § 1226(c)(2)'s detention-without-bond requirement applies to any alien who has committed an offense enumerated in § 1226(c)(1), regardless of how long after release from criminal custody he or she was taken into immigration custody. This interpretation is at odds with the statute, which unambiguously links the "when . . . released" custody instruction in § 1226(c)(1) to the without-bond instruction in § 1226(c)(2), such that the latter applies only after the former is satisfied.

When faced with a question of statutory interpretation, our analysis begins "with the text of the statute." *Yokeno v. Sekiguchi*, 754 F.3d 649, 653 (9th Cir. 2014).

The words of a statute should be accorded their plain meaning, as considered in light of "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). We cannot look to the statute's language in isolation because "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Starting with the text, we find that § 1226(c)(2) is straightforward. It refers simply to "an alien described in paragraph (1)," not to "an alien described in subparagraphs (1)(A)-(D)." We must presume that Congress selected its language deliberately, thus intending that "an alien described in paragraph (1)" is just that—*i.e.* an alien who committed a covered offense *and* who was taken into immigration custody "when . . . released." *See Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructurers Grp.*, 387 F.3d 1046, 1051 (9th Cir. 2004) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992))). Certainly, had Congress wanted to refer only to "an alien described in subparagraphs (A)-(D)," it could have done so. And while we recognize that "Congress has not always been consistent in how it refers to other subsections in the same statute," *Olmos*, 780 F.3d at 1320 (describing a separate provision where Congress referred to "subparagraph (a)" but the context made it obvious that Congress was referring to only subparts (i) and (ii)), we observe that, unlike the example cited by the Third Circuit in *Olmos*, this section's context supports, rather than contradicts, the plain meaning.[12]

As mentioned, there are two relevant sources of authority for the government's detention of aliens in removal proceedings—§ 1226(a) and § 1226(c). Section 1226(a) provides for discretionary detention of any alien in removal proceedings, while § 1226(c) provides a limited exception of mandatory detention for a specified group of aliens. Thus, if the government is not authorized to detain an alien under the narrow exception of § 1226(c), it may only do so under the general rule of § 1226(a). Critically, however, each of these sections includes its own corresponding instructions for releasing detained aliens—§ 1226(a) provides for possible release on bond, while § 1226(c) forbids any release except under special circumstances concerning witness protection. There is one important consequence of this structure: under both the general detention provision in § 1226(a) and the mandatory detention provision in § 1226(c), the authority to detain and the authority to release go hand in hand. That is, an alien detained under § 1226(a) is clearly subject to the release provisions of § 1226(a), whereas one detained under § 1226(c) is subject to the release provisions in § 1226(c). Accordingly, if an alien is not detained in immigration custody "when . . . released" from criminal custody, as required under § 1226(c)(2), then the government derives its sole authority to detain that alien from § 1226(a)(1), and, as a consequence, it must provide the alien with a bond hearing as required under § 1226(a)(2).

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[12] We are thus unpersuaded by the government's argument that there is ambiguity in whether the phrase "when the alien is released" modifies the noun "alien" or only the verb "take into custody." Even if we agreed that the phrase were ambiguous standing alone, it is not ambiguous within the section's structure and surrounding language.

The BIA's interpretation in *In re Rojas* flouts this structure. The BIA held that the "when . . . released" clause was "address[ed] . . . to the statutory command that the 'Attorney General shall take into custody' certain categories of aliens," but that it did not define the categories of aliens subject to the prohibition on bonded release in § 1226(c)(2). *In re Rojas*, 23 I. & N. Dec. at 121. The BIA thereby held, in essence, that the AG can fail to comply with the "when . . . released" requirement of § 1226(c)(1)—thereby necessarily relying on § 1226(a) for its authority to take custody of an alien—but still apply the release conditions of § 1226(c)(2). In other words, even if § 1226(c)(1) authorizes the custody of only those aliens who are detained "when [they are] released" from criminal custody, not those who are detained at a later time, the BIA would still apply § 1226(c)(2)'s proscription on bonded release from immigration custody. This reading simply fails to do justice to the statute's structure. *See Castañeda*, 810 F.3d at 26 (noting that under the BIA's reading, the statute is "oddly misaligned" because it necessarily "de-link[s] the 'Custody' directive in § 1226(c)(1) from the bar to 'Release' in (c)(2)").

The headings in § 1226(c) further illustrate this point. Section 1226(c) as a whole is entitled "Detention of criminal aliens." This heading conveys to the reader that the section provides an exception to the general detention rule of § 1226(a), and that this exception concerns the detention of certain criminal aliens. The two paragraphs within the section are entitled "Custody" and "Release." These headings inform the reader that the section governs the full life cycle of the criminal aliens' detention, with the first paragraph specifying the requirements for taking them into custody, and the second specifying the restrictions on their release. This structure suggests only one logical conclusion: the release provisions of § 1226(c)(2) come into effect only after the government takes a criminal alien into custody according to § 1226(c)(1). And, correspondingly, if the government fails to take an alien into custody according to § 1226(c)(1), then it necessarily may do so only under the general detention provision of § 1226(a), and we never reach the release restrictions in § 1226(c)(2).

Rojas's contrary reading, as Judge Barron explained, would mean that Congress directed the AG to hold without bond aliens "who had never been in criminal custody"—because with the "when . . . released" clause rendered inoperative for purposes of § 1226(c)(2), there would be nothing to impose a requirement of the aliens ever having been in custody.[13] *Castañeda*, 810 F.3d at 27. At the same time,

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[13] This effect occurs because, as Judge Barron noted in *Castañeda*, "there are a variety of offenses for which an alien may be . . . subject to mandatory detention under [§ 1226(c)(1)(A)], but that may never give rise to a formal charge, let alone an indictment,

Rojas's reading would leave the AG "complete discretion to decide not to take [such aliens] into immigration custody at all." *Id.* These incongruous consequences further persuade us to reject the BIA's reading.

Notably, neither the BIA nor those circuits that deferred to the BIA adequately addressed the structure of the relationship between § 1226(a) and § 1226(c). Indeed, the BIA and the Second Circuit failed to address it at all. *See Lora v. Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015) (deeming it ambiguous whether the "when . . . released" clause "is part of the definition of aliens subject to mandatory detention" without considering statutory context); *In re Rojas*, 23 I. & N. Dec. at 121-22 (considering statutory context but failing to acknowledge the relationship between § 1226(a) and § 1226(c)). The Tenth Circuit did address it, and even seemed to agree with our conclusion that custody must be authorized under paragraph (1) of § 1226(c) in order for paragraph (2) to take effect. *Olmos*, 780 F.3d at 1321 (recognizing that the authority to detain "arises in Paragraph '1'" and that "the [AG] must exercise this responsibility 'when the alien is released'"). But, applying the loss-of-authority doctrine, that court concluded that the government maintains its authority to take custody of an alien under § 1226(c)(1) even when it fails to comply with the "when . . . re-

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trial or conviction." 810 F.3d at 26 (alterations in original) (quoting *Saysana v. Gillen*, 590 F.3d 7, 14 (1st Cir. 2009)). "In consequence, some aliens who fall within subparagraphs (A)-(D) will not be subject to (c)(1) because they will never have even been 'released' from criminal custody as the 'when . . . released' clause requires." *Id.* at 27. Such aliens can only be taken into immigration custody under the discretionary detention provision in § 1226(a).

leased" requirement. *Olmos*, 780 F.3d at 1321-22 ("With the alien in the [AG's] custody under his delayed enforcement of § 1226(c)(1), there would be nothing odd about § 1226(c)(2)'s restrictions on when the alien can be released."). Finding that the "when . . . released" requirement imposed no actual limitations on the government, the Tenth Circuit thus concluded that the BIA's interpretation—reading out the "when . . . released" requirement—was reasonable. *Id.* We disagree. As we later explain, the loss-of-authority doctrine does not apply to § 1226(c). And absent this doctrine, we are left with the conclusion that the AG must comply with § 1226(c)(1), including the "when . . . released" requirement, before it can apply § 1226(c)(2).

In sum, we conclude that paragraph (2)'s limitations on release unambiguously depend upon paragraph (1)'s mandate to take custody. "An alien described in paragraph (1)" is therefore one who is detained according to the requirements of paragraph (1). These requirements include the mandate that the government take the alien into custody "when . . . released." The BIA's interpretation to the contrary is impermissible.[14]

B.

We must next decide whether the AG is in compliance with § 1226(c)(1)'s custody mandate—and thus § 1226(c)(2)'s limitations on release apply—even if the

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[14] "Because the statutory language is unambiguous, we end our inquiry at *Chevron*'s first step, and need not reach the question [of] whether the BIA's approach is based on a permissible construction of the statute." *Aragon-Salazar v. Holder*, 769 F.3d 699, 706 (9th Cir. 2014).

AG takes an alien into custody after substantial time has passed since the alien's release from criminal custody. Plaintiffs argue that § 1226(c)(1)'s mandate requiring the AG to detain criminal aliens "when [they are] released" from criminal custody means that they must be taken into custody *promptly* after release, not years later, as were the named Plaintiffs here. The government, on the other hand, argues that the phrase "when . . . released" is ambiguous, supporting either Plaintiffs' reading or a broader reading requiring mandatory detention of any criminal alien arrested by the AG at any point after release from criminal custody. The government's argument wrongly assumes that the BIA had so construed "when . . . released." On the contrary, the BIA explicitly stated that "[t]he statute does direct the [AG] to take custody of aliens *immediately* upon their release from criminal confinement." *Rojas*, 23 I. & N. Dec. at 122 (emphasis added). And even if the BIA had construed the phrase not to require immediate confinement, the statute would foreclose that construction because "when . . . released" unambiguously requires promptness.

Again, we start with the plain language: "The Attorney General shall take into custody any alien who [commits an enumerated offense] when the alien is released [from criminal custody]." 8 U.S.C. § 1226(c). As Judge Barron observed, the first thing that leaps out is that "Congress chose a word, 'when,' that naturally conveys some degree of immediacy as opposed to a purely conditional word, such as 'if.'" *Castañeda*, 810 F.3d at 37 (citation omitted). Of course, the word "when" has multiple dictionary definitions.[15] But looking to context, which of these meanings is the intended one is clear. The word "when" used in a command such as this one requires prompt action. Consider a teacher's common instruction to stop writing *when* the exam ends. There is no doubt that such an instruction requires the student to immediately stop writing at the end of the exam period. Or as one district court noted, "if a wife tells her husband to pick up the kids *when* they finish school, implicit in this command . . . is the expectation that the husband is waiting at the moment" school ends. *Sanchez-Penunuri v. Longshore*, 7 F. Supp. 3d 1136, 1155 (D. Colo. 2013); *see also Khoury v. Asher*, 3 F. Supp. 3d 877, 887 (W.D. Wash. 2014) ("A mandate is meaningless if those subject to it can carry it out whenever they please."). Similarly, the use of the phrase "when . . . released," when paired with the directive to detain, unambiguously requires detention with "some degree of immediacy." *Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012).

Indeed, "[i]f Congress really meant for the duty in (c)(1) to take effect 'in the event of' or 'any time after' an alien's release from criminal custody, we would expect Congress to have said so, given that it spoke with just such directness elsewhere in the IIRIRA." *Castañeda*, 810 F.3d at 38 (citing 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order *at any time after* the reentry." (emphasis added)); *see also Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004) (noting that Congress "easily could have used the language '*after* the alien is released,' 'regardless of when the alien is released,' or other words to that effect"). But instead Congress chose words that signal an expectation of immediate action. *See Jones v. United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context [as] a phrase 'gathers meaning from the words around it.'" (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961))). This word choice must be given its due weight.

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[15] *See, e.g.* Black's Law Dictionary 1842 (3d ed. 1933) (defining "when" alternatively as "[i]mmediately after; as soon as" and as "[i]n case of; on condition that; provided; if"); *see also Hosh*, 680 F.3d at 379-80 (reasoning that the term "when" "can be read, on one hand, to refer to 'action or activity occurring at the time that or as soon as other action has ceased or begun'" or "[o]n the other hand, . . . to mean the temporally broader 'at or during [which] time'" (first quoting *Waffi v. Louiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007), then quoting *Free Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/when)).

Moreover, unlike the government's interpretation, our reading is consistent with Congress's purposes in enacting the mandatory detention provision—to address heightened risks of flight and dangerousness associated with aliens who commit certain crimes, which are serious enough to give rise to criminal custody. *See Demore*, 538 U.S. at 518-19 (describing evidence before Congress). These purposes are ill-served when the critical link between criminal detention and immigration detention is broken and the alien is set free for long stretches of time. Congress's concerns over flight and dangerousness are most pronounced at the point when the criminal alien is released. Consequently, we can be certain that Congress did not intend to authorize delays in the detention of these criminal aliens. And correspondingly, without considering the aliens' conduct in any intervening period of freedom, it is impossible to conclude that the risks that once justified mandatory detention are still present. These considerations are prudently reflected in Congress's decision that these individuals must be detained "when . . . released," and that if they aren't, the AG may detain them only if warranted under the general detention provision of 8 U.S.C. § 1226(a), upon a bond hearing during which an individualized assessment of risks is conducted. We therefore conclude that the phrase "when . . . released" connotes some degree of immediacy.

C.

Finally, we turn to the government's argument that even if § 1226(c)(1) unambiguously requires prompt detention, we should nonetheless uphold the AG's authority to detain without bond an alien who committed a covered offense even when the AG has violated the mandate of § 1226(c)(1). The government points to a line of cases holding that: "[i]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)); *see also id.* at 158 ("Nor, since *Brock* [*v. Pierce County*, 476 U.S. 253 (1986)], have we ever construed a provision that the government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later."); *United States v. Nashville, C & St. L. Ry.*, 118 U.S. 120, 125 (1886); *United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009). Under this "loss-of-authority" line of cases, the government's argument goes, the AG's failure to timely take into custody a criminal alien in no way affects her ability to act pursuant to the mandatory detention provision of § 1226(c)(2). Several circuits have agreed. *See Sylvain*, 714 F.3d at 157; *Lora*, 804 F.3d at 612-13; *Olmos*, 780 F.3d at 1324-26.

The courts adopting this reasoning rely on *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), in which the Supreme Court interpreted a provision of the Bail Reform Act that required judicial officers to hold a bond hearing "immediately upon the [defendant]'s first appearance before the judicial officer." 18 U.S.C. § 3142(f)(2). Montalvo-Murillo didn't receive a timely hearing under this provision, and the district court released him from custody. The Supreme Court reversed, holding that "a failure to comply with the first appearance requirement does not defeat the government's authority to seek detention of the person charged." 495 U.S. at 717. The Court noted that nowhere did the statute provide for the release of pretrial detainees as a remedy for the failure by judicial officers to provide prompt hearings. *Id.* And it concluded that "[a]utomatic release contravene[d] the object of the statute, to provide fair bail procedures while protecting the safety of the public and assuring the appearance . . . of defendants . . . . " *Id.* at 719. To hold otherwise, the Court reasoned, would "bestow upon the defendant a windfall" and impose on the public "a severe penalty" by "mandating release of possibly dangerous defendants every time some deviation" from the statute occurred. *Id.* at 720. Looking to this decision, our sister circuits have treated *Montalvo-Murillo* as a "close[] analog" to the dispute over § 1226(c)'s limitations. *Sylvain*, 714 F.3d at 158. We find, however, that *Montalvo-Murillo* is readily distinguishable.

Critically, unlike in *Montalvo-Murillo*, the government here invokes the loss-of-authority doctrine to justify extending a statutory provision that in fact curtails, rather than expands, the government's discretionary authority. *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L. J. 363, 367 (2014) ("The [mandatory detention provision] strips the immigration judge of her power to conduct a bond hearing and decide whether the individual poses any danger or flight risk, and likewise precludes DHS from making discretionary judgments about whether detention is appropriate.").[16] Indeed, the sole practical effect of the district court's decision in this case is to *reinstate* the government's general authority, under § 1226(a), to decline to detain, or to release on bond, those criminal aliens who are not timely detained under § 1226(c). In short, we decline to apply the loss-of-authority doctrine where, as here, there is no loss of authority.

Moreover, unlike the district court's ruling in *Montalvo-Murillo*, our holding does not craft a new remedy inconsistent with the statutory scheme. Whereas in *Montalvo-Murillo* the statute at issue did not identify a remedy for a delayed hearing, *see United*

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[16] Congress's purposes in enacting the provision further demonstrate its desire to curtail the authority of the immigration judge and DHS to release recently incarcerated criminals from immigration custody. *See Demore v. Kim*, 538 U.S. 510, 518-19 (2003) (noting Congress's concerns that immigration authorities had a "near-total inability to remove deportable criminal aliens" and often made detention decisions on the basis of "funding and detention space").

States v. Montalvo-Murillo, 876 F.2d 826, 831 (10th Cir. 1989) (per curiam) (noting that "Congress did not provide . . . the remedy" for a violation of § 3142(f)), *overruled by Montalvo-Murillo*, 495 U.S. at 722), here the statutory structure makes clear precisely what occurs in the absence of prompt detention under 8 U.S.C. § 1226(c): the general detention provision, 8 U.S.C. § 1226(a), applies. Far from imposing a judicially-created remedy for untimely detention, we are merely holding that under the statute, the conditions for the mandatory detention exception are not met when detention is too long delayed. *See Castañeda*, 810 F.3d at 40-41 (distinguishing several cases where courts improperly fashioned their own sanctions).

We do not share the Third Circuit's concern that failing to apply the loss-of-authority doctrine "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline." *Sylvain*, 714 F.3d at 160. Congress's design of protecting the public by detaining criminal aliens is undoubtedly premised on the notion that *recently* released criminal aliens may be presumed a risk. Such a presumption carries considerably less force when these aliens live free and productive lives after serving their criminal sentences. *See Saysana v. Gillen*, 590 F.3d 7, 17-18 (1st Cir. 2009) ("By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be."). Indeed, the imposition of robotic detention procedures in such cases not only smacks of injustice, but also drains scarce detention resources that should be reserved for those aliens who pose the greatest risks.

We therefore hold that the mandatory detention provision of 8 U.S.C. § 1226(c) applies only to those criminal aliens who are detained promptly after their release from criminal custody, not to those detained long after.

IV.

In so holding, we are not suggesting that the mandate to detain "when . . . released" necessarily requires detention to occur at the exact moment an alien leaves criminal custody. The plain meaning of "when . . . released" in this context suggests that apprehension must occur with a reasonable degree of immediacy. *Accord Hosh*, 680 F.3d at 381 ("[W]e agree that Congress's command . . . connotes some degree of immediacy . . . ."); *Rojas*, 23 I. & N. Dec. at 122 ("The statute does direct the [AG] to take custody of aliens immediately upon their release from criminal confinement."). Thus, depending on the circumstances of an individual case, an alien may be detained "when . . . released" even if immigration authorities take a very short period of time to bring the alien into custody.

This appeal, however, does not present the question exactly how quickly detention must occur to satisfy the "when . . . released" requirement. The class was defined as those who were not "immediately detained" but were still taken into mandatory custody, and the government did not challenge the class definition on the ground that it required further clarification as to the meaning of "immediately." Nor did the government appeal class certification on the ground that the named class members were not typical of the class as a whole—even though the named Plaintiffs spent years in their home communities after completing their criminal sentences, whereas some class members presumably were released for shorter times. We thus need not decide for purposes of the instant appeal exactly how promptly an alien must be brought into immigration custody after being released from criminal custody for the transition to be immediate enough to satisfy the "when . . . released" requirement. The district court granted preliminary injunctive relief to a class of aliens who were not "immediately detained" when released from criminal custody, and that grant of relief accords with our interpretation of the statutory requirements.

* * *

Under the plain language of 8 U.S.C. § 1226(c), the government may detain without a bond hearing only those criminal aliens it takes into immigration custody promptly upon their release from triggering criminal custody.

AFFIRMED.

ICE Detainee Population Statistics by Field Office

Field Office	Average Daily Population	Number Currently Detained	Number Detained with Final Orders
Atlanta	2,683	2,780	1,010
Baltimore	322	328	143
Boston	810	844	363
Buffalo	535	509	253
Chicago	1,441	1,435	363
Dallas	928	918	361
Denver	459	447	107
Detroit	602	568	211
El Paso	1,235	1,113	187
FOSC	0	0	0
Houston	2,008	1,811	660
Los Angeles	2,304	2,107	483
Miami	2,250	2,169	655
New Orleans	2,320	2,210	1,110
New York City	934	977	357
Newark	1,155	1,144	491
Philadelphia	1,124	999	336
Phoenix	2,753	2,700	788
Salt Lake City	474	494	182
San Antonio	4,167	4,157	2,070
San Diego	1,061	1,041	287
San Francisco	598	613	171
Seattle	1,278	1,346	327
St. Paul	768	675	186
Washington, D.C.	824	777	236
Total	**33,034**	**32,162**	**11,337**

Cited in [illegible] v. Johnson, No. [illegible]326 archived on Ju[illegible] 2016

FY2012 data is as of IIDS v 1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of N

Average daily population excludes ORR and MIRP facilities.

cited in Preap v. Johnson, No. 14-16326 archived on July 22, 2016

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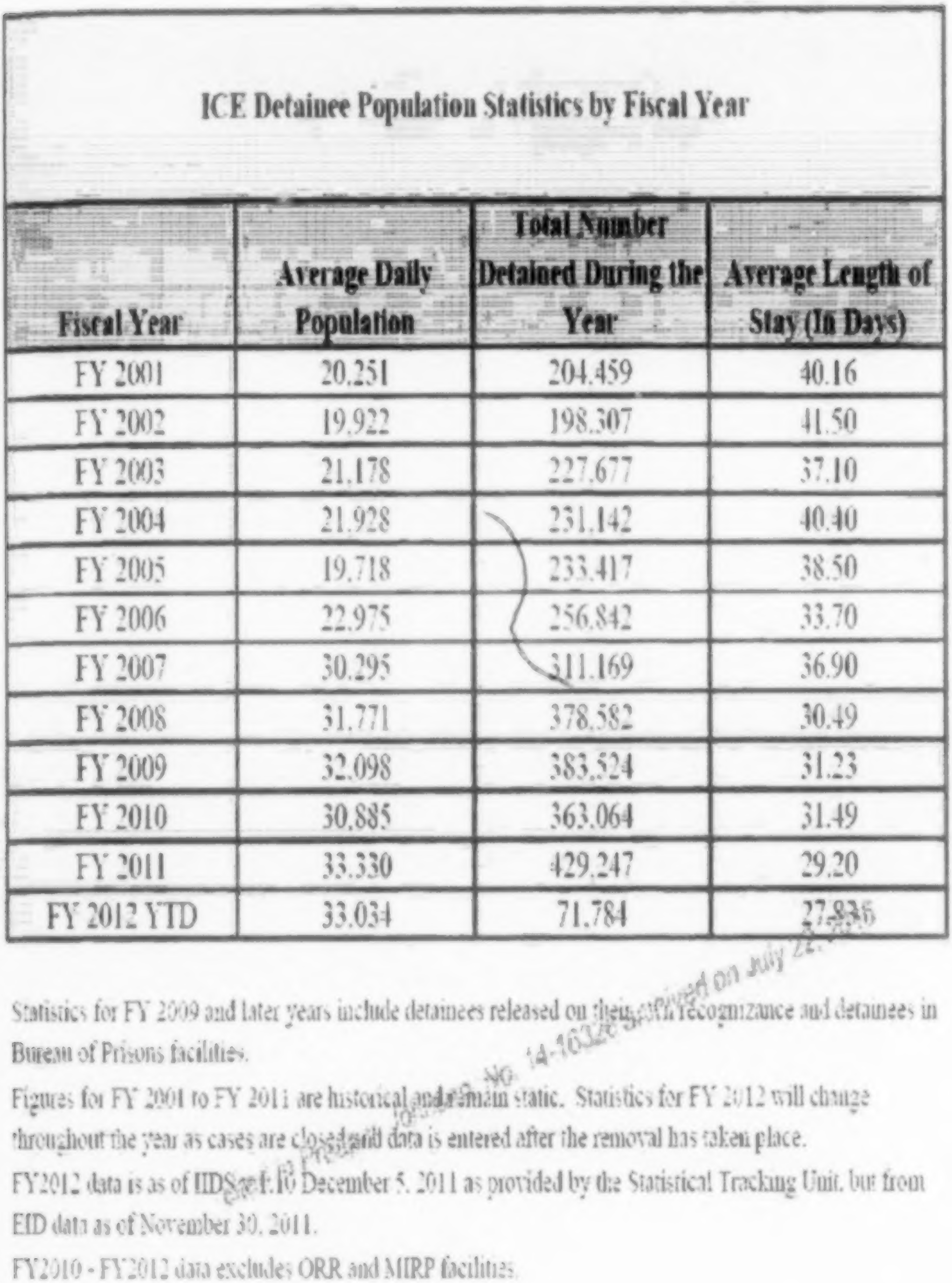


ICE Detainee Population Statistics by Fiscal Year

Fiscal Year	Average Daily Population	Total Number Detained During the Year	Average Length of Stay (In Days)
FY 2001	20,251	204,459	40.16
FY 2002	19,922	198,307	41.50
FY 2003	21,178	227,677	37.10
FY 2004	21,928	231,142	40.40
FY 2005	19,718	233,417	38.50
FY 2006	22,975	256,842	33.70
FY 2007	30,295	311,169	36.90
FY 2008	31,771	378,582	30.49
FY 2009	32,098	383,524	31.23
FY 2010	30,885	363,064	31.49
FY 2011	33,330	429,247	29.20
FY 2012 YTD	33,034	71,784	27.836

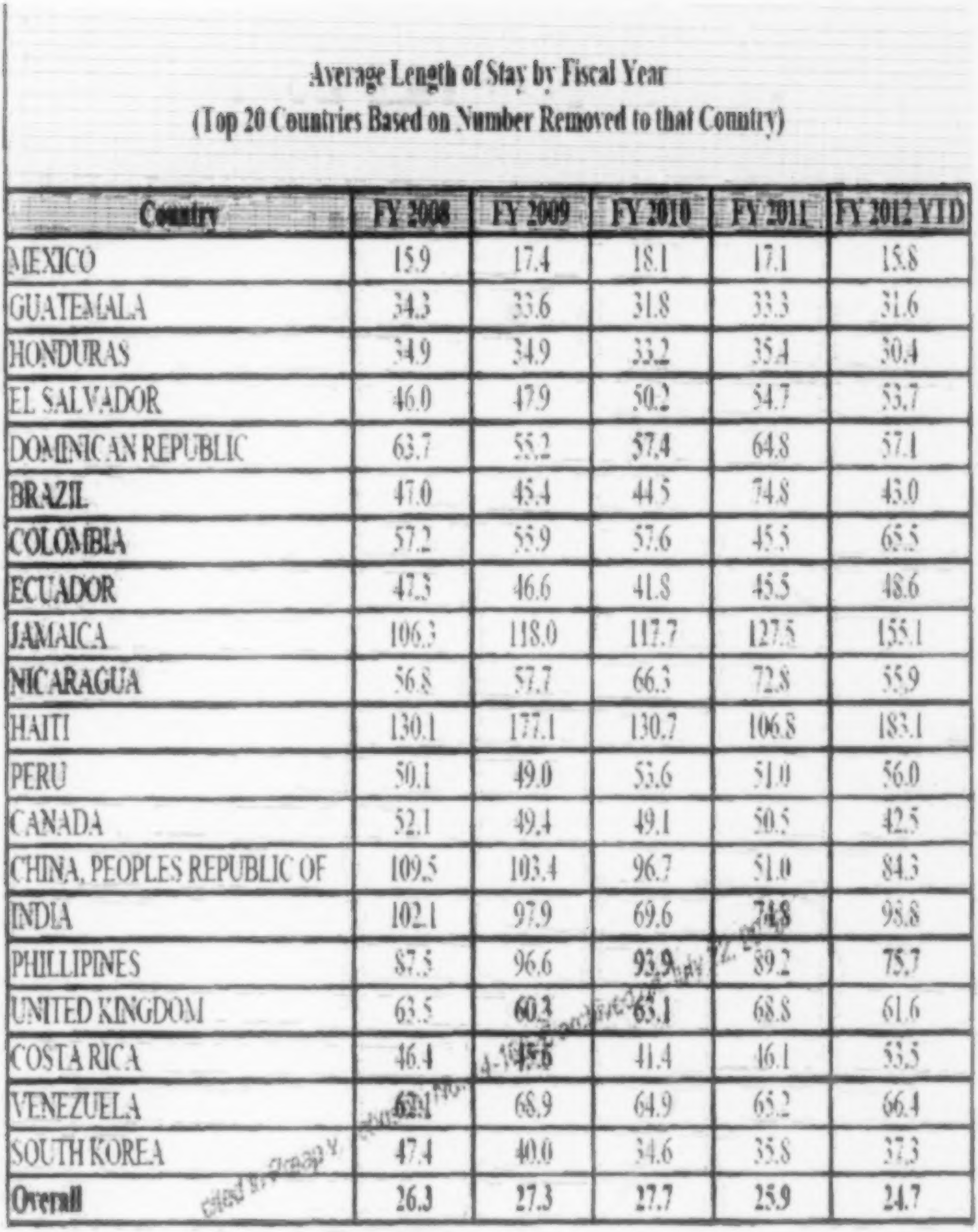
Statistics for FY 2009 and later years include detainees released on their own recognizance and detainees in Bureau of Prisons facilities.

Figures for FY 2001 to FY 2011 are historical and remain static. Statistics for FY 2012 will change throughout the year as cases are closed and data is entered after the removal has taken place.

FY2012 data is as of IIDS as of December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November 30, 2011.

FY2010 - FY2012 data excludes ORR and MIRP facilities.

No. 14-1632 archived on July 22



Average Length of Stay by Fiscal Year
(Top 20 Countries Based on Number Removed to that Country)

Country	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012 YTD
MEXICO	15.9	17.4	18.1	17.1	15.8
GUATEMALA	34.3	33.6	31.8	33.3	31.6
HONDURAS	34.9	34.9	33.2	35.4	30.4
EL SALVADOR	46.0	47.9	50.2	54.7	53.7
DOMINICAN REPUBLIC	63.7	55.2	57.4	64.8	57.1
BRAZIL	47.0	45.4	44.5	74.8	43.0
COLOMBIA	57.2	55.9	57.6	45.5	65.5
ECUADOR	47.3	46.6	41.8	45.5	48.6
JAMAICA	106.3	118.0	117.7	127.5	155.1
NICARAGUA	56.8	57.7	66.3	72.8	55.9
HAITI	130.1	177.1	130.7	106.8	183.1
PERU	50.1	49.0	53.6	51.0	56.0
CANADA	52.1	49.4	49.1	50.5	42.5
CHINA, PEOPLES REPUBLIC OF	109.5	103.4	96.7	51.0	84.3
INDIA	102.1	97.9	69.6	74.8	98.8
PHILLIPINES	87.5	96.6	93.9	89.2	75.7
UNITED KINGDOM	63.5	60.3	63.1	68.8	61.6
COSTA RICA	46.4	45.6	41.4	46.1	53.5
VENEZUELA	62.1	68.9	64.9	65.2	66.4
SOUTH KOREA	47.4	40.0	34.6	35.8	37.3
Overall	26.3	27.3	27.7	25.9	24.7

Figures for FY2008 through FY2011 are historical and remain static. Figures for FY 2012 will change throughout the year as cases are closed and data is entered after the removal has taken place.

FY2012 data is as of IIDS v1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November 30, 2011.

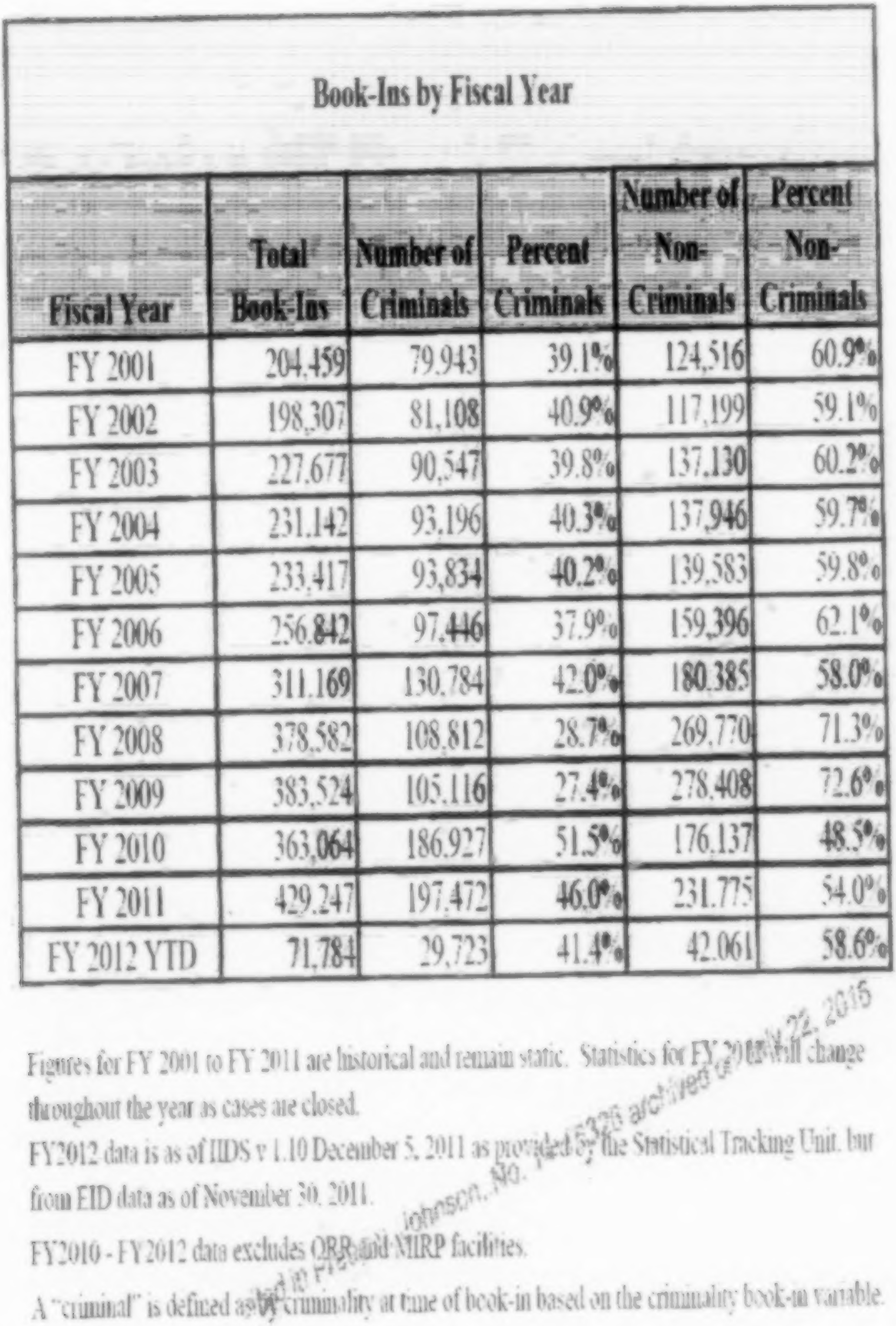
FY2010 -FY2012 data excludes ORR and MIRP facilities.

Criminal Alien Program Charging Documents by Field Office

Field Office	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012 YTD
Atlanta	1,296	7000	8,170	10,306	11,772	1,898
Baltimore	438	1438	1,890	1,573	1,460	250
Boston	1,370	2613	3,452	3,069	2,881	567
Buffalo	353	598	572	751	493	94
Chicago	13,203	15081	11,694	20,740	15,210	2,211
Dallas	10,596	15250	17,173	13,296	14,268	1,974
Denver	3,671	6019	8,204	6,890	5,884	829
Detroit	2,057	4470	5,793	5,626	4,962	679
El Paso	2,310	6795	6,244	6,204	4,429	677
FOSC	0	0	0	31	1,661	569
Houston	5,967	13361	13,311	16,150	14,202	2,342
Los Angeles	19,240	23943	19,543	18,406	21,070	3,419
Miami	5,170	10049	10,214	8,940	9,351	1480
New Orleans	3,465	6292	7,785	8,823	9,777	1557
New York City	6,622	9778	7,651	7,818	7,367	1052
Newark	1,470	4503	5,214	4,631	4,072	678
Philadelphia	3,627	5051	6,032	4,618	4,621	720
Phoenix	10,724	7142	10,990	8,050	6,177	809
Salt Lake City	3,997	6999	7,365	6,591	5,297	653
San Antonio	4,477	11704	10,312	12,766	11,331	1,834
San Diego	10,920	12344	11,194	9,058	11,047	1505
San Francisco	10,001	27385	27,428	24,080	25,477	3,751
Seattle	4,203	9104	10,654	8,644	7,379	1156
St. Paul	1,959	4071	6,217	6,055	5,743	894
Washington, D.C.	1,686	3101	3,215	3,817	5,692	586
Unassigned	24,286	6098	3,479	6,284	1,121	210
Total	164,296	221,085	232,796	223,217	212,744	32,674

FY 2007-2011 data from EID is historical and remains static.

FY2012 data is as of IIDS v1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November 30, 2011.



Book-Ins by Fiscal Year

Fiscal Year	Total Book-Ins	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
FY 2001	204,459	79,943	39.1%	124,516	60.9%
FY 2002	198,307	81,108	40.9%	117,199	59.1%
FY 2003	227,677	90,547	39.8%	137,130	60.2%
FY 2004	231,142	93,196	40.3%	137,946	59.7%
FY 2005	233,417	93,834	40.2%	139,583	59.8%
FY 2006	256,842	97,446	37.9%	159,396	62.1%
FY 2007	311,169	130,784	42.0%	180,385	58.0%
FY 2008	378,582	108,812	28.7%	269,770	71.3%
FY 2009	383,524	105,116	27.4%	278,408	72.6%
FY 2010	363,064	186,927	51.5%	176,137	48.5%
FY 2011	429,247	197,472	46.0%	231,775	54.0%
FY 2012 YTD	71,784	29,723	41.4%	42,061	58.6%

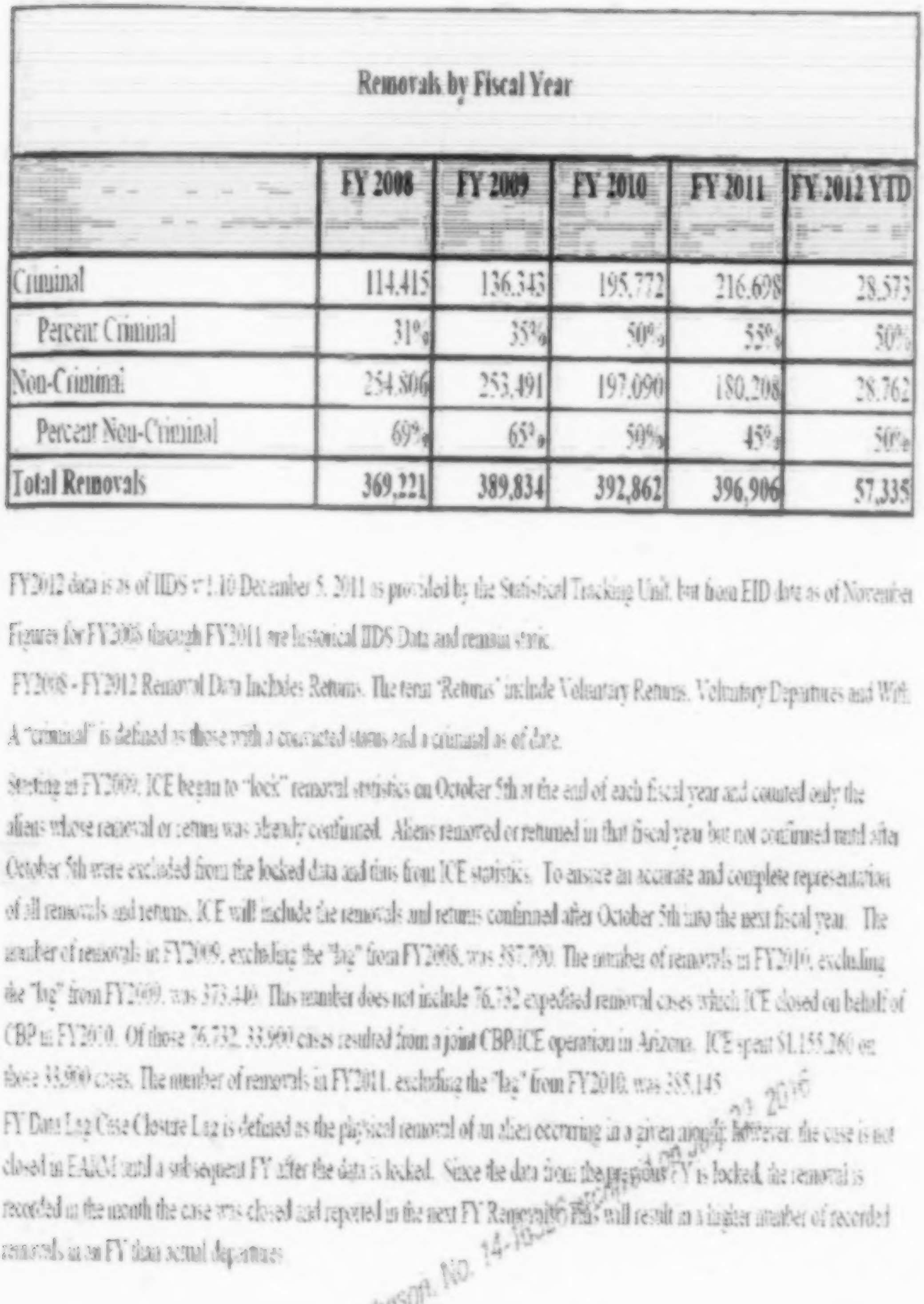
Figures for FY 2001 to FY 2011 are historical and remain static. Statistics for FY 2012 will change throughout the year as cases are closed.

FY2012 data is as of IIDS v 1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November 30, 2011.

FY2010 - FY2012 data excludes ORR and MIRP facilities.

A "criminal" is defined as by criminality at time of book-in based on the criminality book-in variable.

Johnson, No. 15326 archived on July 22, 2015



Removals by Fiscal Year

	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012 YTD
Criminal	114,415	136,343	195,772	216,698	28,573
Percent Criminal	31%	35%	50%	55%	50%
Non-Criminal	254,806	253,491	197,090	180,208	28,762
Percent Non-Criminal	69%	65%	50%	45%	50%
Total Removals	**369,221**	**389,834**	**392,862**	**396,906**	**57,335**

FY2012 data is as of IIDS v1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November

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FY2008 - FY2012 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and With

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FY Data Lag Case Closure Lag is defined as the physical removal of an alien occurring in a given month; however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.

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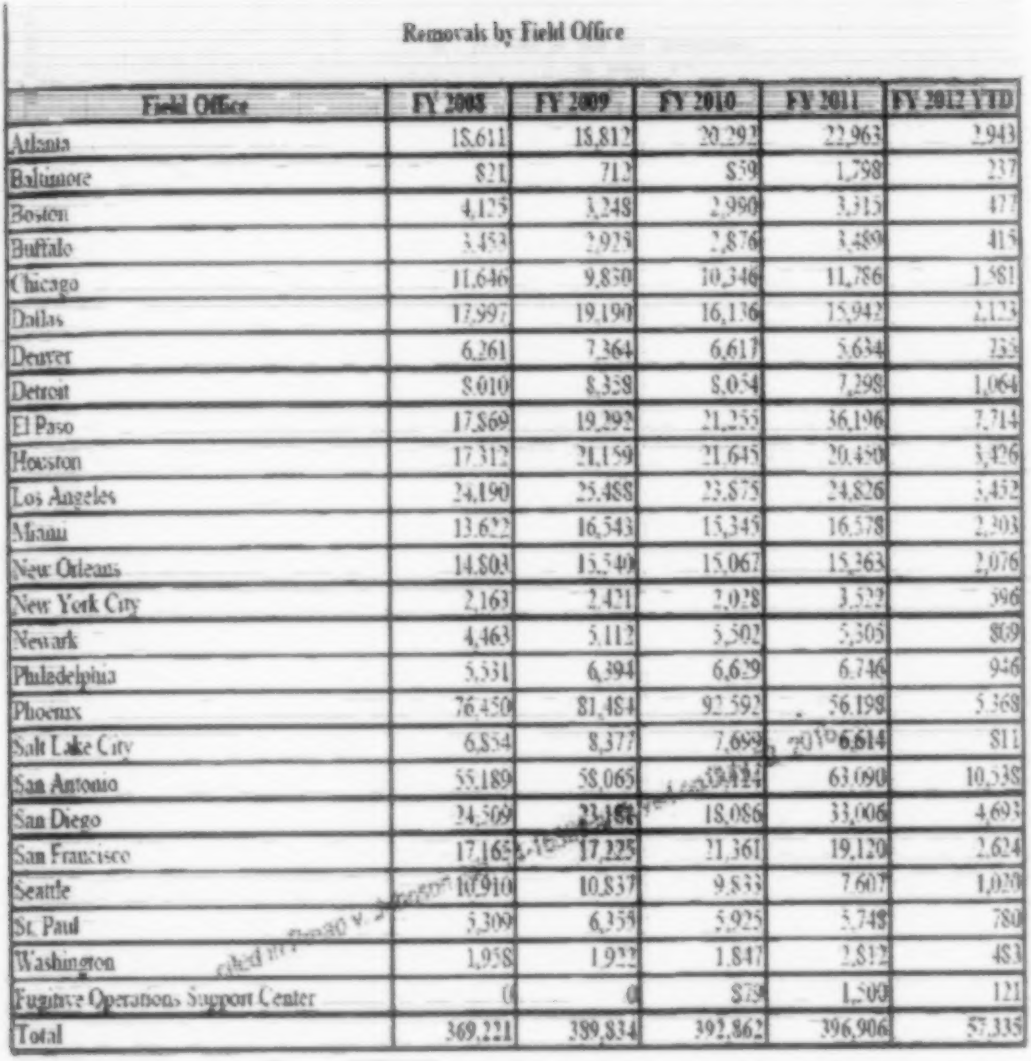

Removals by Field Office

Field Office	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012 YTD
Atlanta	18,611	18,812	20,292	22,963	2,943
Baltimore	821	712	859	1,798	237
Boston	4,125	3,248	2,990	3,315	477
Buffalo	3,453	2,925	2,876	3,489	415
Chicago	11,646	9,830	10,346	11,786	1,581
Dallas	17,997	19,190	16,136	15,942	2,123
Denver	6,261	7,364	6,617	5,634	733
Detroit	8,010	8,358	8,054	7,298	1,064
El Paso	17,869	19,292	21,255	36,196	7,714
Houston	17,312	21,159	21,645	20,450	3,426
Los Angeles	24,190	25,488	23,875	24,826	3,452
Miami	13,622	16,543	15,345	16,578	2,303
New Orleans	14,803	15,540	15,067	15,363	2,076
New York City	2,163	2,421	2,028	3,522	396
Newark	4,463	5,112	5,502	5,305	809
Philadelphia	5,531	6,394	6,629	6,746	946
Phoenix	76,450	81,484	92,592	56,198	5,368
Salt Lake City	6,854	8,377	7,699	6,614	811
San Antonio	55,189	58,065	55,124	63,090	10,538
San Diego	24,509	23,181	18,086	33,006	4,693
San Francisco	17,165	17,225	21,361	19,120	2,624
Seattle	10,910	10,837	9,833	7,607	1,020
St. Paul	5,309	6,355	5,925	5,748	780
Washington	1,958	1,922	1,847	2,812	483
Fugitive Operations Support Center	0	0	879	1,500	121
Total	369,221	389,834	392,862	396,906	57,335

FY2012 data is as of IIDS v.1.10 December 5, 2011 as provided by the Statistical Tracking Unit, run from EID data as of November 30, 2011

Figures for FY2008 through FY2011 are historical IIDS Data and remain static.

FY2008 - FY2012 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and Withdrawals.

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Removals by Field Office for FY 2012 YTD
Criminals and Non-Criminals

Field Office	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
Atlanta	2,943	2,089	71%	854	29%
Baltimore	237	123	52%	114	48%
Boston	477	216	45%	261	55%
Buffalo	415	251	60%	164	40%
Chicago	1,581	946	60%	635	40%
Dallas	2,123	1,517	71%	606	29%
Denver	735	552	75%	183	25%
Detroit	1,064	552	52%	512	48%
El Paso	7,714	**2,320**	30%	5,394	70%
Houston	3,426	2,379	69%	1,047	31%
Fugitive Operations Support Center	121	0	0%	121	100%
Los Angeles	3,452	2,441	71%	1,011	29%
Miami	2,303	901	39%	1,402	61%
New Orleans	2,076	1,365	66%	711	34%
New York City	596	275	46%	321	54%
Newark	809	332	41%	477	59%
Philadelphia	946	632	67%	314	33%
Phoenix	5,368	3,043	57%	2,325	43%
Salt Lake City	811	560	69%	251	31%
San Antonio	10,538	3,751	36%	6,787	64%
San Diego	4,693	1,448	31%	3,245	69%
San Francisco	2,624	1,495	57%	1,129	43%
Seattle	1,020	601	59%	419	41%
St. Paul	780	491	63%	289	37%
Washington	483	293	61%	190	39%
Total	57,335	28,573	50%	28,762	50%

FY2012 data is as of IIDS v 1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of No

Figures for FY2008 through FY2011 are historical IIDS Data and remain static.

FY2008 - FY2012 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures an

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Removals by Field Office for FY 2011
Criminals and Non-Criminals

Field Office	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
Atlanta	22,963	15,203	66%	7,760	34%
Baltimore	1,798	753	42%	1,045	58%
Boston	3,315	1,281	39%	2,034	61%
Buffalo	3,489	1,986	57%	1,503	43%
Chicago	11,786	7,491	64%	4,295	36%
Dallas	15,942	10,570	66%	5,372	34%
Denver	5,634	3,902	69%	1,732	31%
Detroit	7,298	3,741	51%	3,557	49%
El Paso	36,196	17,012	47%	19,184	53%
Houston	20,450	15,206	74%	5,244	26%
Fugitive Operations Support Center	1,500	23	2%	1,477	98%
Los Angeles	24,826	17,429	70%	7,397	30%
Miami	16,578	6,928	42%	9,650	58%
New Orleans	15,363	9,249	60%	6,114	40%
New York City	3,522	1,326	38%	2,196	62%
Newark	5,305	2,240	42%	3,065	58%
Philadelphia	6,746	4,159	62%	2,587	38%
Phoenix	56,198	27,885	50%	28,313	50%
Salt Lake City	6,614	4,406	67%	2,208	33%
San Antonio	63,090	28,533	45%	34,557	55%
San Diego	33,006	14,412	44%	18,594	56%
San Francisco	19,120	12,615	66%	6,505	34%
Seattle	7,607	5,272	69[illegible]	2,335	31%
St. Paul	5,748	3,467	60%	2,281	40%
Washington	2,812	1,609	57%	1,203	43%
Total	396,906	216,698	55%	180,208	45%

FY2011 data is historical and remains static. FY2011 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.

A "criminal" is defined as those with a convicted status and a criminal as of date.

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Removals by Field Office for FY 2010 Criminals and Non-Criminals					
Field Office	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
Atlanta	20,292	11,830	58%	8,462	42%
Baltimore	859	271	32%	588	68%
Boston	2,990	1,047	35%	1,943	65%
Buffalo	2,876	1,547	54%	1,329	46%
Chicago	10,346	5,386	52%	4,960	48%
Dallas	16,136	8,342	52%	7,794	48%
Denver	6,617	4,447	67%	2,170	33%
Detroit	8,054	3,504	44%	4,550	56%
El Paso	21,255	11,294	53%	9,961	47%
Fugitive Operations Support Center	879	40	5%	839	95%
Houston	21,645	17,013	79%	4,632	21%
Los Angeles	23,875	15,215	64%	8,660	36%
Miami	15,345	5,314	35%	10,031	65%
New Orleans	15,067	7,451	49%	7,616	51%
New York City	2,028	555	27%	1,473	73%
Newark	5,502	1,830	33%	3,672	67%
Philadelphia	6,629	3,892	59%	2,737	41%
Phoenix	92,592	35,937	39%	56,655	61%
Salt Lake City	7,699	4,487	58%	3,212	42%
San Antonio	55,124	23,538	43%	31,586	57%
San Diego	18,086	10,916	60%	7,170	40%
San Francisco	21,361	13,249	62%	8,112	38%
Seattle	9,833	4,714	48%	5,119	52%
St. Paul	5,925	2,817	48%	3,108	52%
Washington	1,847	1,136	62%	711	38%
Total	392,862	195,772	50%	197,090	50%

FY2010 data is historical and remains static. FY2010 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.
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Removals by Field Office for FY 2009
Criminals and Non-Criminals

Field Office	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
Atlanta	18,812	7,379	39%	11,433	61%
Baltimore	712	144	20%	568	80%
Boston	3,248	796	25%	2,452	75%
Buffalo	2,925	1,384	47%	1,541	53%
Chicago	9,830	4,603	47%	5,227	53%
Dallas	19,190	6,460	34%	12,730	66%
Denver	7,364	3,013	41%	4,351	59%
Detroit	8,358	2,798	33%	5,560	67%
El Paso	19,292	6,171	32%	13,121	68%
Houston	21,159	13,674	65%	7,485	35%
Los Angeles	25,488	9,215	36%	16,273	64%
Miami	16,543	3,842	23%	12,701	77%
New Orleans	15,540	5,879	38%	9,661	62%
New York City	2,421	755	31%	1,666	69%
Newark	5,112	1,517	30%	3,595	70%
Philadelphia	6,394	3,081	48%	3,313	52%
Phoenix	81,484	23,563	29%	57,921	71%
Salt Lake City	8,377	3,390	40%	4,987	60%
San Antonio	58,065	11,934	21%	46,131	79%
San Diego	23,181	10,402	45%	12,779	55%
San Francisco	17,225	8,345	48%	8,880	52%
Seattle	10,837	4,468	41%	6,369	59%
St. Paul	6,355	2,759	43%	3,596	57%
Washington	1,922	771	40%	1,151	60%
Total	389,834	136,343	35%	253,491	65%

Figures for FY2009 are historical IIDS Data and remain static. FY2009 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.

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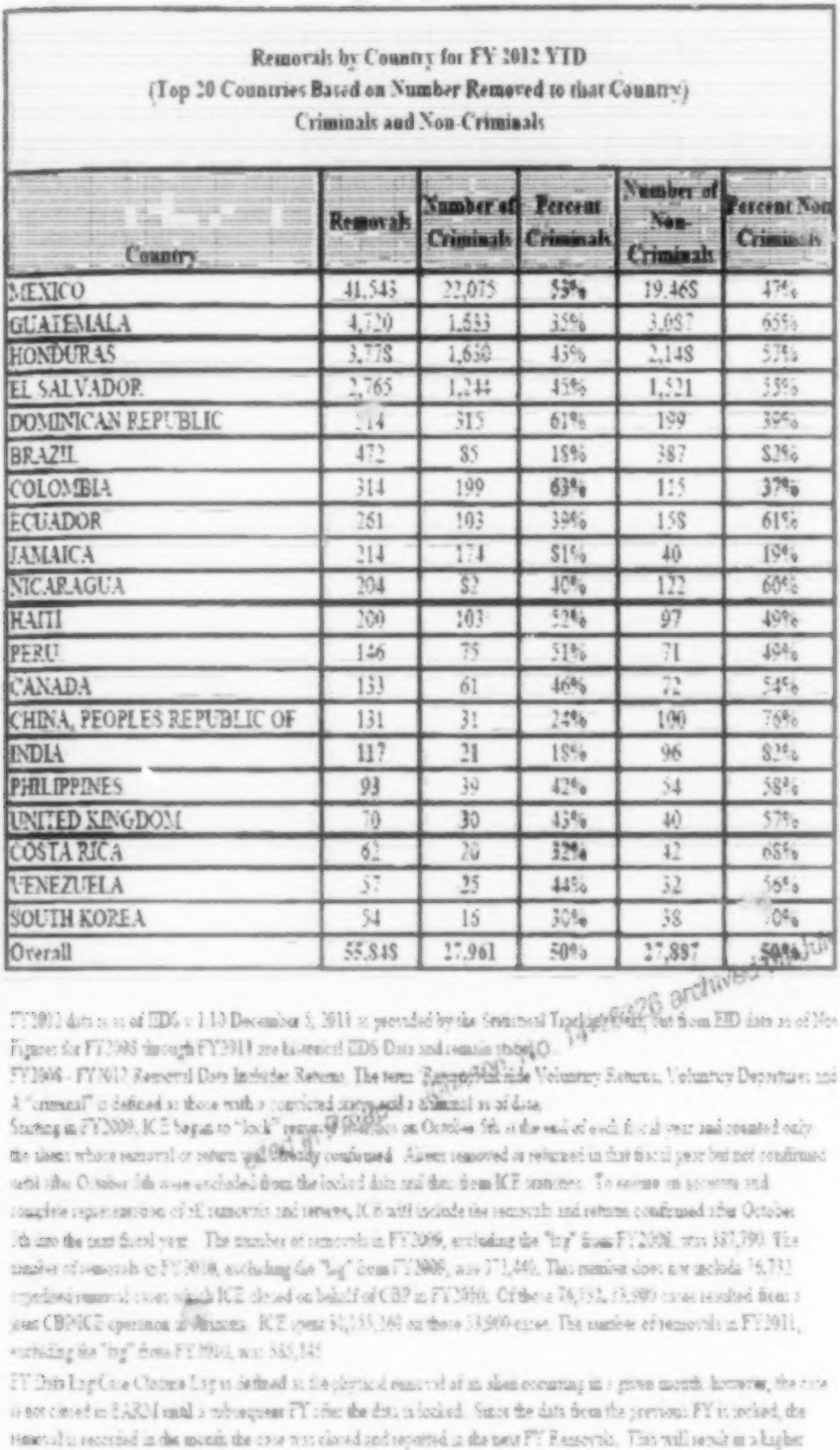

Removals by County for FY 2012 YTD
(Top 20 Countries Based on Number Removed to that Country)
Criminals and Non-Criminals

Country	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non Criminals
MEXICO	41,543	22,075	53%	19,468	47%
GUATEMALA	4,720	1,633	35%	3,087	65%
HONDURAS	3,778	1,630	43%	2,148	57%
EL SALVADOR	2,765	1,244	45%	1,521	55%
DOMINICAN REPUBLIC	514	315	61%	199	39%
BRAZIL	472	85	18%	387	82%
COLOMBIA	314	199	63%	115	37%
ECUADOR	261	103	39%	158	61%
JAMAICA	214	174	81%	40	19%
NICARAGUA	204	82	40%	122	60%
HAITI	200	103	52%	97	49%
PERU	146	75	51%	71	49%
CANADA	133	61	46%	72	54%
CHINA, PEOPLES REPUBLIC OF	131	31	24%	100	76%
INDIA	117	21	18%	96	82%
PHILIPPINES	93	39	42%	54	58%
UNITED KINGDOM	70	30	43%	40	57%
COSTA RICA	62	20	32%	42	68%
VENEZUELA	57	25	44%	32	56%
SOUTH KOREA	54	16	30%	38	70%
Overall	55,848	27,961	50%	27,887	50%

archived on Jun 22, 2016

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Removals by Country for FY 2011
(Top 20 Countries Based on Number Removed to that Country)
Criminals and Non-Criminals

Country	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non Criminals
MEXICO	286,893	169,781	59%	117,112	41%
GUATEMALA	33,324	12,663	38%	20,661	62%
HONDURAS	23,822	11,318	48%	12,504	52%
EL SALVADOR	18,870	8,931	47%	9,939	53%
BRAZIL	3,634	619	17%	3,015	83%
DOMINICAN REPUBLIC	3,380	2,199	65%	1,181	35%
COLOMBIA	2,273	1,132	50%	1,141	50%
ECUADOR	1,991	805	40%	1,186	60%
NICARAGUA	1,693	771	46%	922	54%
JAMAICA	1,572	1,289	82%	283	18%
CHINA, PEOPLES REPUBLIC OF	1,297	230	18%	1,067	82%
PERU	1,190	540	45%	650	55%
CANADA	923	467	51%	456	49%
INDIA	854	180	21%	674	79%
PHILIPPINES	808	360	45%	448	55%
HAITI	731	249	34%	482	66%
POLAND	492	175	36%	317	64%
SRI LANKA	481	22	5%	459	95%
COSTA RICA	440	186	42%	254	58%
INDONESIA	423	33	8%	390	92%
Overall	385,091	211,950	55%	173,141	45%

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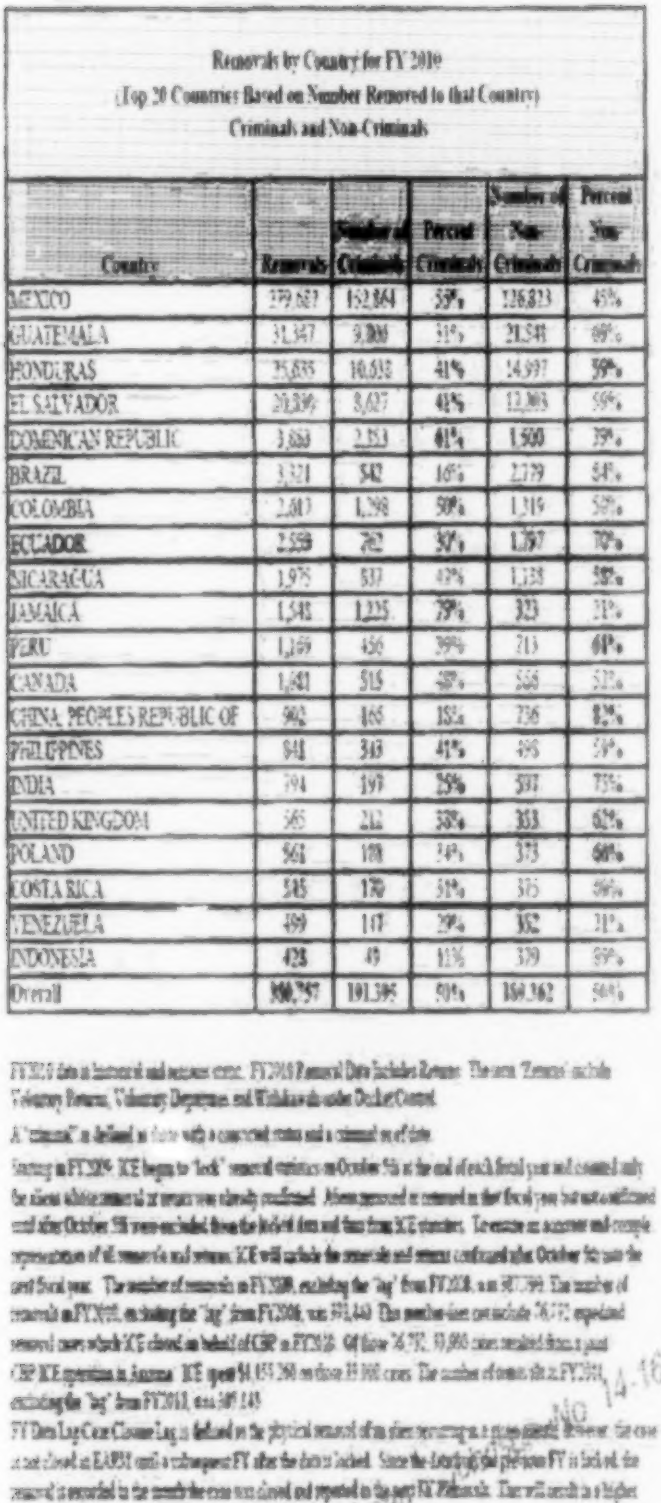
FY Data Lag/Case Closure Lag is defined as the physical removal of an alien occurring in a given month; however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.



Removals by Country for FY 2010
(Top 20 Countries Based on Number Removed to that Country)
Criminals and Non-Criminals

Country	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
MEXICO	279,687	152,864	55%	126,823	45%
GUATEMALA	31,347	9,806	31%	21,541	69%
HONDURAS	25,635	10,638	41%	14,997	59%
EL SALVADOR	20,330	8,327	41%	12,003	59%
DOMINICAN REPUBLIC	3,653	2,153	59%	1,500	41%
BRAZIL	3,321	542	16%	2,779	84%
COLOMBIA	2,617	1,298	50%	1,319	50%
ECUADOR	2,559	762	30%	1,797	70%
NICARAGUA	1,975	837	42%	1,138	58%
JAMAICA	1,548	1,225	79%	323	21%
PERU	1,169	456	39%	713	61%
CANADA	1,081	515	48%	566	52%
CHINA, PEOPLES REPUBLIC OF	902	166	18%	736	82%
PHILIPPINES	841	343	41%	498	59%
INDIA	794	197	25%	597	75%
UNITED KINGDOM	565	212	38%	353	62%
POLAND	561	188	34%	373	66%
COSTA RICA	545	170	31%	375	69%
VENEZUELA	499	147	29%	352	71%
INDONESIA	428	49	11%	379	89%
Overall	390,757	195,395	50%	195,362	50%

FY2010 data is historical and remains static. FY2010 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.

cited in Prelp
No 14-16326 archived on July 22, 2016

Removals by Country for FY 2009
(Top 20 Countries Based on Number Removed to that Country)
Criminals and Non-Criminals

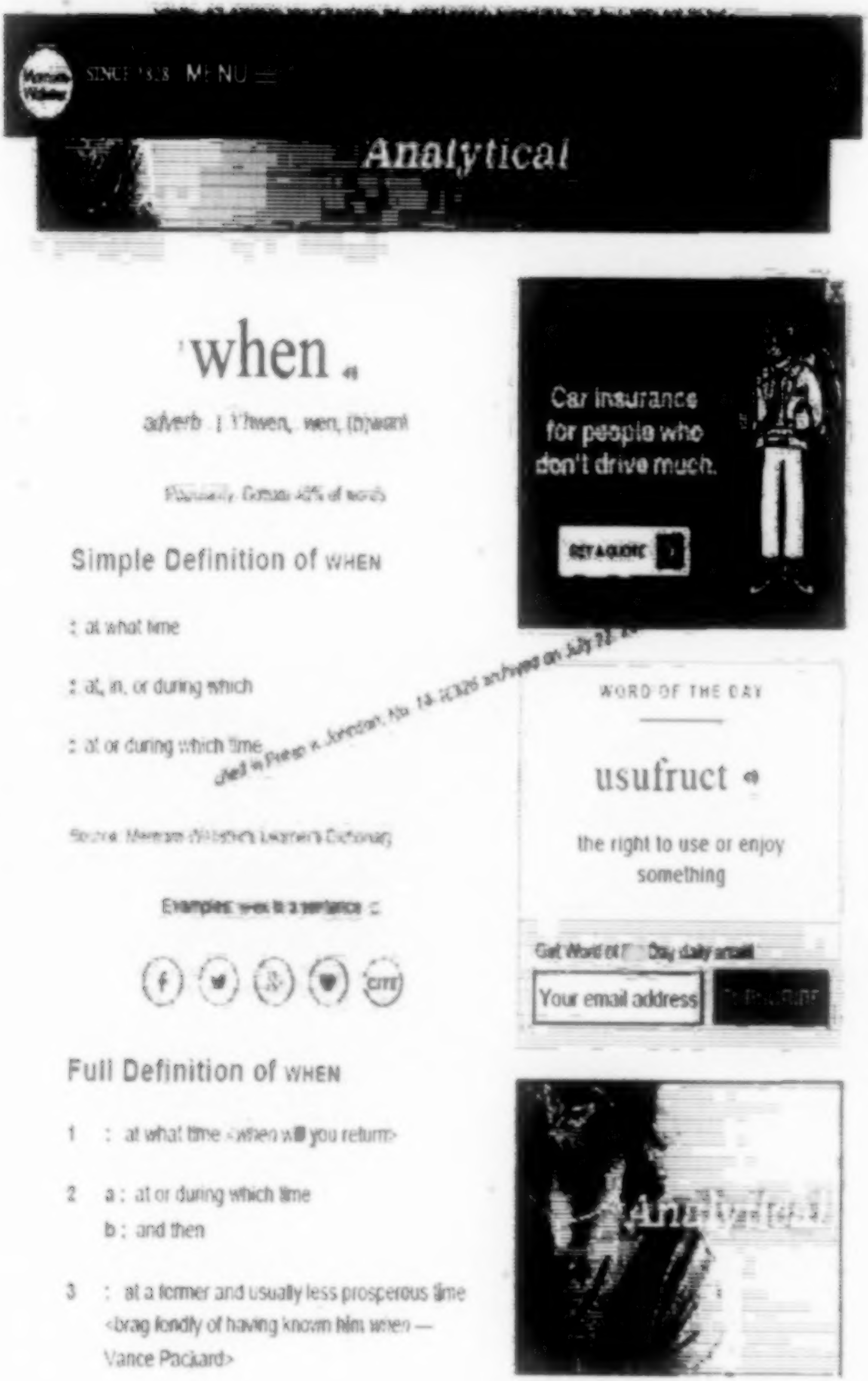
Country	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
MEXICO	275,217	104,274	38%	170,943	62%
GUATEMALA	30,411	6,502	21%	23,909	79%
HONDURAS	27,679	6,939	25%	20,740	75%
EL SALVADOR	21,157	6,318	30%	14,839	70%
DOMINICAN REPUBLIC	3,850	2,176	57%	1,674	43%
BRAZIL	3,298	384	12%	2,914	88%
COLOMBIA	2,778	1,127	41%	1,651	59%
ECUADOR	2,526	645	26%	1,881	74%
NICARAGUA	2,190	615	28%	1,575	72%
JAMAICA	1,630	1,254	77%	376	23%
PERU	1,212	377	31%	835	69%
CHINA, PEOPLES REPUBLIC OF	964	138	14%	826	86%
CANADA	842	391	46%	451	54%
INDIA	807	188	23%	619	77%
HAITI	710	468	66%	242	34%
PHILIPPINES	684	259	38%	425	62%
UNITED KINGDOM	663	199	30%	464	70%
COSTA RICA	573	120	21%	453	79%
POLAND	504	133	26%	371	74%
VENEZUELA	498	132	27%	366	73%
Overall	378,193	132,639	35%	245,554	65%

FY2009 data is historical IIDS Data. It is static and includes Returns. The term 'Removal' include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.

A "criminal" is defined as those with a convicted status and a criminal as of date.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 373,440. This number does not include 76,732 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of these 76,732, 33,900 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent $1,155,260 on these 33,900 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 385,145.

FY Data Lag Case Closure Lag is defined as the physical removal of an alien occurring in a given month, however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.



when

adverb | \ˈhwen, ˈwen, (ˌ)hwən\

Popularity: Bottom 40% of words

Simple Definition of WHEN

: at what time

: at, in, or during which

: at or during which time

cited in [illegible] v. Jordan, No. 14-[illegible] archived on July [illegible]

Source: Merriam-Webster's Learner's Dictionary

Examples: WHEN in a sentence

Full Definition of WHEN

1 : at what time <when will you return>

2 a : at or during which time
b : and then

3 : at a former and usually less prosperous time <brag fondly of having known him when —Vance Packard>

Car insurance for people who don't drive much.
GET A QUOTE

WORD OF THE DAY

usufruct

the right to use or enjoy something

Get Word of the Day daily email!

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See when defined for English-language learners

See when defined for kids

Examples of WHEN in a sentence

When did the American Civil War begin?

The detective asked me *when* I last saw her.

When is the next performance?

It was a time *when* people didn't have to lock their doors.

the happy days *when* we were together

We're still waiting for the test results, *when* we'll decide our next move.

Origin and Etymology of WHEN

Middle English, from Old English *hwanne, hwenne*; akin to Old High German *hwanne* when, Old English *hwā* who — more at WHO

First Known Use: before 12th century

Cited in [illegible] v. Johnson, No. 14-16326 archived on July 22, 2018

TRENDING NOW

1 dystopia
'A dystopian nightmare'

2 abrogate, servile
"That pledge was not a blanket commi...

3 kleptocracy
The U.S. seeks to recover more than ...

4 empathy
An increase in empathy?

5 plagiarism, plagiarize
To steal and pass off the words of an...

SEE ALL >

BROWSE DICTIONARY

wheel watch

wheel well

wheel window

wheelwork

wheelwright

¹when

conjunction

WORD GAMES

Simple Definition of WHEN

: at or during the time that

: just after the time that

: at any or every time that

Source: Merriam-Webster's Learner's Dictionary

Take a 3-minute break and test your skills!

Which is a synonym of indolent?

melancholy

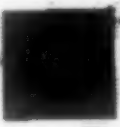
frenetic

lazy

philistine

Test your vocabulary with our 10-question quiz!

TAKE THE QUIZ ›



Test Your Knowledge - and learn some interesting things along the way.

TAKE THE QUIZ ›

Full Definition of WHEN

1 a : at or during the time that : WHILE <went fishing when he was a boy>

b : just at the moment that <stop writing when the bell rings>

c : at any or every time that <when he listens to music, he falls asleep>

Johnson, No. 14-[illegible] 2016

2 : in the event that : IF <a contestant is disqualified when he disobeys the rules>

3 a : considering that <why use water at all when you can drown in it — Stuart Chase>

b : in spite of the fact that : ALTHOUGH <quit politics when I might have had a great career in it>

4 : the time or occasion at or in which <tomorrow is when we must decide> <humor is when you laugh — Carl Reiner>

Examples of WHEN in a sentence

When he finally showed up, he was drunk.

When I was in school, we didn't have computers.

You can go *when* the bell rings.

Call me *when* you get home.

Things were better *when* he got a job.

When he watches television, he falls asleep.

She quit politics *when* she might have had a great career in it.

Origin and Etymology of WHEN

Middle English, from Old English *hwanne, hwenne,* from *hwanne, hwenne,* adverb

cited in [illegible] v. Johnson, No. [illegible]326 archived on July 22, 2016

First Known Use: before [illegible]th century

Related to WHEN

Synonyms
as, so long as, while, whilst [*chiefly British*]

Related Words
but, if

Rhymes with WHEN

ben, den, en, fen, Fenn, gen, glen, hen, ken, Ken, n, pen, Rennes, Seine, sen, Sten, ten, then, wen, wren, Wren, yen, Zen

²when

pronoun | \ˈhwen, ˈwen\

Simple Definition of WHEN

: what or which time

Source: Merriam-Webster's Learner's Dictionary

Full Definition of WHEN

: what or which time <life-long homes for those who have lived here since *when* — Kim Waller>

cited in Prom v. Jo[illegible] 18328 archived on July 22, 2016

See when defined for English-language learners

Examples of WHEN in a sentence

He retired in 1998, since *when* he has been devoting his time to gardening.

You need the report by *when*?

First Known Use of WHEN

14th century

⁴when

noun

Definition of WHEN

: the time in which something is done or comes about <troubled his head very little about the *hows* and *whens* of life — Laurence Sterne>

cited in [illegible] No. [illegible]26 archived on July 22, 2016

First Known Use of WHEN

1616

WHEN Defined for Kids

^{1}when

adverb | \ ˈhwen, ˈwen, hwən, wən\

Definition of WHEN for Students

1 : at what time <*When* did you leave?>

2 : the time at which <I was not sure of *when* they'd come.>

3 : at, in, or during which <It was hard to remember the time *when* they hadn't played that game … — Eleanor Estes, *The Hundred*

Prieto v. Johnson, No. 14-16326 archived on July 22, 2018

^{2}when

conjunction

Definition of WHEN for Students

1 : at, during, or just after the time that <She wants to leave *when* I do.>

2 : in the event that : IF <*When* you have a question, raise your hand.>

3 : ALTHOUGH 1 <Why do you tease, *when* you know it's wrong?>

when

pronoun

Definition of WHEN for Students

: what or which time <Since *when* have you been an expert?>

Cited in Preap v. Johnson, No. 14-16326 archived on July 22, 2016

Learn More about WHEN

Thesaurus: All synonyms and antonyms for *when*

Spanish Central: Translation of *when*

Nglish: Translation of *when* for Spanish speakers

Britannica English: Translation of *when* for Arabic speakers

Seen and Heard

What made you want to look up *when*? Please tell us where you read or heard it (including the quote if possible).

10 Comments Sort by **Newest ▾**

56a

We'll tell you all the perpendiculars

Is 'alright' all right?

It is in fact a real word (but that doesn't r

One goose, two geese. One moose, tw

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Citation

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BRITANNICA ENGLISH - ARABIC TRANSLATION

ENGLISH - SPANISH-ENGLISH TRANSLATION

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-35482
D.C. No. 2:13-cv-01367-RAJ

BASSAM YUSUF KHOURY; ET AL.,
PLAINTIFFS-APPELLEES

v.

NATHALIE ASHER, FIELD OFFICE DIRECTOR, ICE;
ET AL., DEFENDANTS-APPELLANTS

Argued and Submitted: July 8, 2015
Seattle, Washington
[Filed: Aug. 4, 2016]

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

MEMORANDUM[*]

Before: KLEINFELD, NGUYEN, and FRIEDLAND, Circuit Judges.

Defendants appeal from the district court's order certifying a class of alien detainees and declaring that the class was entitled to bond hearings. The class comprised aliens who were subjected to mandatory detention under 8 U.S.C. § 1226(c) even though they were not detained immediately upon their release from criminal custody. In granting class certification and declaratory relief, the district court concluded that § 1226(c) applies only to aliens who are detained immediately upon their release from criminal custody. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

---

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The plain language of § 1226(c) makes clear that mandatory detention applies only to those aliens detained "when [they are] released" from criminal custody. *See Preap v. Johnson*, slip op. at ___. Because the phrase "when . . . released" conveys a degree of immediacy, "§ 1226(c) applies only to those criminal noncititzens who are detained promptly after their release from criminal custody, not to those detained long after." *Id.* at ___. We disagree with the government's arguments under *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), that it should nonetheless be allowed to hold without bond aliens whose detention is untimely under § 1226(c). *Montalvo-Murillo* is distinguishable. *See Preap v. Johnson*, slip op. at ___.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No.: 13-CV-5754 YGR

MONY PREAP, EDUARDO VEGA PADILLA, AND JUAN LOZANO MAGDALENO, PLAINTIFFS-PETITIONERS

v.

JEH JOHNSON, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS-RESPONDENTS

[Filed: May 15, 2014]

ORDER GRANTING PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION, DENYING DEFENDANTS' MOTION TO DISMISS, AND GRANTING PETITIONERS' MOTION FOR CLASS CERTIFICATION

Plaintiffs-Petitioners Mony Preap, Eduardo Vega Padilla, and Juan Lozano Magdaleno ("Petitioners") bring this immigration habeas corpus class action against Jeh Johnson, Secretary of the United States Department of Homeland Security, *et al.* (the "Government") and challenge their detention without bond under Section 236(c) of the Immigration and Nationality Act ("INA"), Title 8 U.S.C. § 1226(c) ("Section 1226(c)"). In subsection (a) of the same statute, the INA affords individuals a bond hearing in order to be detained pending removal proceedings. In contrast, Section 1226(c) requires mandatory detention pending removal proceedings for a specifically defined subset of individuals. Petitioners argue that they do not fall within the category defined in Section 1226(c), and therefore cannot be subject to mandatory detention. They seek injunctive and declaratory relief that they, and members of the class, must be afforded a bond hearing so that an immigration judge can determine whether they should be released during the pendency of their removal proceedings.

Now before the Court are three motions: (1) Petitioners' Motion for Preliminary Injunction (Dkt. No. 23); (2) the Government's Motion to Dismiss (Dkt. No. 24); and (3) Petitioners' Motion for Class Certification (Dkt. No. 8). On March 18, 2014, the Court heard oral argument on these motions and on April 1, 2014, the parties provided supplemental briefing. (Dkt. Nos. 45, 46, 47.) The parties concede that the first two motions—Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Dismiss—center on a pure issue of statutory interpretation; granting one motion necessarily requires denial of the other. Thus, the Court begins with that purely legal issue and will then address the Motion for Class Certification.

Having carefully considered the parties' arguments, relevant statutes, case law, and for all the reasons stated herein, the Court finds that Section 1226(c) unambiguously requires mandatory detention for individuals who are detained immediately upon release from custody. Thus, as Petitioners do not fall within that category, the Court **GRANTS** Petitioners' Motions for Preliminary Injunction and **DENIES** the Government's Motion to Dismiss. The Court also **GRANTS** Petitioners' Motion for Class Certification, as the class action mechanism easily and efficiently establishes the right of all class members to a bond hearing pursuant to Section 1226(a).

I. JURISDICTION

Federal district courts may grant writs of habeas corpus if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Though some immigration decisions, including bond determinations, are not subject to judicial review, *see, e.g.*, 8 U.S.C. § 1226(e), courts may hear the habeas petitions of immigration detainees raising "constitutional claims or questions of law." *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) (citations omitted). Here, Petitioners argue that the Government's practice of subjecting them, and members of the class, to mandatory detention pursuant to Section 1226(c) is unauthorized by the language of the statute itself. Thus, Petitioners present a pure question of law. The Government does not contest the Court's jurisdiction to hear the case.[1]

II. FACTUAL BACKGROUND

The factual predicate giving rise to this action stems from the Immigration and Customs Enforcement Agency's ("ICE") treatment of each of the three Petitioners in this action. Each Petitioner was convicted of a crime enumerated in Section 1226(c), and thereafter charged with removal from the United States and detained by ICE. It is undisputed that the predicate offenses for which Petitioners were detained are offenses enumerated in Section 1226(c)(1)(A)-(D). However, ICE's detention of each Petitioner did not commence at the time each Petitioner was released from custody. Rather, ICE detained Mr. Preap seven years after his relevant misdemeanor convictions; Mr. Padilla, over ten years after his relevant convictions; and Mr. Magdaleno over five years later. Because the Government determined that each petitioner could be detained pursuant to Section 1226(c), none was afforded a bond hearing. The ultimate issue is not whether the Government can detain Petitioners pending such proceedings—Petitioners contend that such detention is proper if evidence adduced at a bond hearing establishes that they present a risk of flight or public danger. Rather, the ultimate issue for resolution is whether the Government was statutorily authorized under Section 1226(c) to detain Petitioners mandatorily and without a regularly-scheduled bond hearing.

---

[1] The Court notes that in the parties' Joint Submission following oral argument, the Government for the first time, in two sentences, challenged the Court's authority to order injunctive relief in this action. (*See* Dkt. No. 46 at 2.) The Government's argument is as untimely as it is unfounded. Section 1226(e) does not bar the relief Petitioners seek. *See Demore v. Kim*, 538 U.S. 510, 516-17 (2003). Nor does Title 8 U.S.C. section 1252(f) bar said relief. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2009). The argument was not raised in the Government's Motion, nor was it briefed.

A. PETITIONER MONY PREAP

Petitioner Mony Preap is thirty-two years old. (Dkt. No. 8, Ex. A ("Preap Decl.") ¶ 2.) He was born in a refugee camp and is a native of Cambodia. (*Id.*) Preap entered the United States as an infant in 1981 and is a lawful permanent resident. (*Id.*) He is a single father to his son, who is a United States citizen, and a caretaker for his mother, who is in remission from cancer and suffers from seizures. (*Id.* ¶ 4.)

In 2006, Preap was convicted of two misdemeanor counts of possession of marijuana in violation of California Health and Safety Code section 11357(a) and sentenced to time served. (*Id.* ¶ 7; Dkt. No. 26, Ex. 28 ("Preap DHS Record") at 3.) In 2013, Preap was arrested for inflicting corporal injury on a spouse in violation of California Penal Code section 273.5. (Preap Decl. ¶ 7; Preap DHS Record at 3.) On September 9, 2013, Preap pleaded guilty to battery in violation of California Penal Code section 242 and was sentenced to ninety days of incarceration in the Sonoma County Detention Facility. (Dkt. No. 26, Ex. 27.)

On September 11, 2013, upon his release from the Sonoma County Detention Facility, ICE officers arrested and charged Preap with being removable as a result of his 2006 misdemeanor convictions for possession of marijuana. (Preap Decl. ¶ 3; Preap DHS Record.) Preap was detained at an ICE detention facility pending removal proceedings. (Preap Decl. ¶ 3.) On December 9, 2013, Preap requested a bond hearing, which was denied on December 10, 2013. (Preap Decl. ¶ 6.) While Preap was initially found to be removable as charged, on December 17, 2013, after three months of detention and after the filing of this action, an immigration judge granted Preap a Cancellation of Removal. (Mot. to Dismiss at 3; Dkt. No. 26, Ex. 29.) The Government did not oppose the grant of cancellation of removal and waived its right of appeal.[2] (*See* Dkt. No. 26, Ex. 29.)

---

[2] Although the Government contends that Preap's claim is mooted by his recent Cancellation of Removal, the Court finds that he may properly remain a named plaintiff in this action because of the inherently transitory nature of his claim, and because it is capable

B. PETITIONER EDUARDO VEGA PADILLA

Petitioner Eduardo Vega Padilla is forty-eight years old. (Dkt. No. 8, Ex. B ("Padilla Decl.") ¶ 2.) He came to the United States in 1966 from Mexico when he was sixteen months old and became a lawful permanent resident that same year. (*Id.*) Padilla has five children, all of whom are United States citizens. (*Id.* ¶ 3.) He also has six grandchildren and three siblings who are also United States citizens and live in the Sacramento area. (*Id.*) Prior to detention, Padilla lived with his mother, his daughter, and his grandson. (*Id.*)

In 1997, Padilla was convicted for possession of a controlled substance (methamphetamine), a misdemeanor, in violation of California Health and Safety Code section 11377(a). (*Id.* ¶ 7; Dkt. No. 26, Ex. 3 ("Padilla Records I.").) Padilla was sentenced to thirty days. (Padilla Records I.) In 2000, Padilla was convicted of felony possession of methamphetamine in violation of California Health and Safety Code section 11377(a) and was sentenced to 180 days of confinement. (Dkt. No. 26, Ex. 4 ("Padilla Records II") at 6.) While on probation for the second offense, police officers searching Padilla's home discovered a firearm in a shed behind his home. (Padilla Decl. ¶ 7.) Padilla was convicted of being a felon in possession of a firearm in violation of California Penal Code section 12021(a)(1) and was sentenced to 180 days in jail. (Padilla Decl. ¶ 7; Dkt. No. 26, Ex. 5 ("Padilla Records III") at 7.) Padilla was released in 2002. (Padilla Decl. ¶ 7.)

---

of repetition, yet evading review. *See U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 398-99 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).

Over ten years after Padilla's release from his sentence from the firearms conviction, on August 15, 2013, ICE charged Padilla with being removable from the United States based on his controlled substances and firearm convictions. (Dkt. No. 26, Exs. 9, 10.) ICE agents went to Padilla's home and he turned himself over voluntarily. (Padilla Decl. ¶ 4.) On October 15, 2013, an immigration judge found that Padilla was lawfully detained under Title 8 U.S.C. section 1226(c); thus, he was not eligible for a bond hearing despite the fact that he was not detained upon his release in 2002. (Dkt. No. 26, Ex. 13.)

On December 3, 2013, an immigration judge ordered Padilla removed from the United States under Title 8 U.S.C. section 1227(a)(2)(A)(iii) as an alien convicted of a controlled substance offense. (Dkt. No. 26, Ex. 11.) On December 26, 2013, Padilla appealed the removal order to the Board of Immigration Appeals ("BIA") where it remains pending. (Dkt. No. 26, Ex. 12.) On February 14, 2014, having been held for six months, Padilla became eligible for a bond hearing in accordance with the Ninth Circuit's preliminary injunction in *Rodriguez v. Robbins*.[3] *See Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013) ("*Rodriguez II*"). On March 7, 2014, Padilla received his six- month *Rodri-*

---

[3] Under the Ninth Circuit's ruling in *Rodriguez v. Robbins*, once an alien detained under Title 8 U.S.C. section 1226(c) has been subject to detention for six months, the statutory authorization for detention converts to Title 8 U.S.C. section 1226(a) and the Government is obligated to provide an individualized bond hearing. *See Rodriguez II*, 715 F.3d at 1138. Effectively, an individual can only be held pursuant to Section 1226(c)—and thus be denied the opportunity for a bond hearing—for six months. *See id.*

guez hearing and was released on bond. (Dkt. No. 38, Ex. B.)

C. PETITIONER JUAN LOZANO MAGDALENO

Petitioner Juan Lozano Magdaleno is a fifty-seven year old native of Mexico. (Dkt. No. 8, Ex. C ("Magdaleno Decl.") ¶ 2.) Magdaleno came to the United States in 1974 and has been a lawful permanent resident for thirty-nine years. (*Id.*) Prior to detention, Magdaleno lived with his wife, two of his four children, his son-in-law, and one of his ten grandchildren, all of whom are United States citizens. (*Id.* ¶ 4.)

On October 13, 2000, Magdaleno was convicted as a felon in possession of a firearm in violation of California Penal Code section 12021(a)(1). (Dkt. No. 26, Ex. 16 ("Magdaleno Records").) According to Magdaleno, he earned a living by purchasing storage units at auctions and selling the contents of the units at his thrift store. (Magdaleno Decl. ¶ 9.) Bidders on storage units do not know the contents of the units prior to purchase, and one of the units that Magdaleno purchased contained an old rifle. (*Id.*) When police officers came to Magdaleno's thrift store on an unrelated matter, they arrested him for possessing the rifle. (*Id.*) Magdaleno was sentenced to 147 days of confinement and 3 years of probation. (Magdaleno Records.)

On August 21, 2007, Magdaleno was convicted of driving on a suspended license/driving under the influence in violation of California Vehicle Code section 14601.2(a), a misdemeanor, and possession of a controlled substance (methamphetamine), a felony, in violation of California Health and Safety Code section 11377(a). (Dkt. No. 26, Ex. 18.) He was sentenced to six months of confinement and released in January 2008. (*Id.*; Magdaleno Decl. ¶ 10.)

Five years after his release, on July 17, 2013, ICE arrested Magdaleno at his residence and charged him with removal based upon his October 2000 and May 2007 convictions. (Dkt. No. 26, Ex. 22.) Magdaleno was detained that same day at the West County Detention Center in Richmond, California. (Magdaleno Decl. ¶ 3.)

Magdaleno challenged ICE's charges of removability, but the immigration judge denied his application for relief from removal and ordered that he be removed. (Dkt. No. 26, Ex. 24 at 7-8.) On December 26, 2013, Magdaleno appealed the removal to the BIA. (Dkt. No. 26, Ex. 25.) This appeal remains pending. (Mot. to Dismiss at 6; Dkt. No. 34 ("Petitioners' Traverse") at 5.)

On December 9, 2013, Magdaleno requested a bond hearing and challenged his detention before an immigration judge. (Magdaleno Decl. ¶ 3.) That judge found that Magdaleno was lawfully detained under Title 8 U.S.C. section 1226(c) despite not having been detained by ICE upon release from custody and was not due an individualized bond hearing. (Dkt. No. 26, Ex. 23.)

On February 14, 2014, Magdaleno was provided a *Rodriguez* hearing, and he was denied release due to the determination that he was a flight risk. (Dkt. No. 28 ¶¶ 2, 3.) The immigration judge based this determination in part on the fact that Magdaleno was appealing his removal order. (*Id.* ¶ 3.)

III. MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO DISMISS

The parties agree that resolution of Petitioners' Motion for Preliminary Injunction and Defendant's Motion to Dismiss turns on a question of pure statutory interpretation: what is the meaning of the phrase "when the alien is released" in Section 1226(c)?[4] Accordingly, the Court resolves this question first.[5]

A. STATUTORY OVERVIEW

Congress has enacted a multi-layered statutory scheme that provides for civil detention of aliens during removal proceedings. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008). Section 1226 is one such provision. Where an alien falls within Section 1226 determines whether his detention is discretionary (as provided in Section 1226(a)) or mandatory (as provided in Section 1226(c)).

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[4] If Petitioners' interpretation of Section 1226(c) prevails, they will have established all four prongs of the preliminary injunction test: a likelihood of success on the merits, that the balance of equities tips in their favor, the likelihood of irreparable harm in the absence of injunctive relief, and that granting an injunction will serve the public interest. If Petitioners' interpretation fails and the Government's succeeds, Petitioners will have failed to state a claim and the Government's Motion to Dismiss will be granted.

[5] Petitioners alternatively argue that the Government's practice of subjecting them to mandatory detention pursuant to Section 1226(c) long after "when [they were] released" from state custody violates the Due Process Clause of the Fifth Amendment to the United States Constitution. Because the Court finds that Petitioners' claim is conclusively resolved on statutory interpretation grounds, the Court need not, and therefore does not, address the merits of Petitioners' Due Process argument.

Pursuant to Section 1226(a), when an alien is charged with removal, ICE may seek to have that individual detained pending removal proceedings. Section 1226(a) affords the Government discretion to release an individual on his own recognizance or on bond while his removal case is pending if the Government determines that release would not present a risk of flight or a danger to the community. 8 U.S.C. § 1226(a). However, if the alien falls within the category of individuals defined in Section 1226(c), Congress requires mandatory detention while removal proceedings are pending. This case stems from the parties' disagreement on the legal interpretation and application of Section 1226(c), which reads in pertinent part as follows:

> (c) **Detention of criminal aliens. (1) Custody.** The Attorney General ***shall take into custody*** any alien who—
>
> > (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) ["Inadmissible aliens"] of this title,
> >
> > (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii) ["Multiple criminal convictions"], (A)(iii) ["Aggravated felony"], (B) ["Controlled substances"], (C) ["Certain firearms offenses"], or (D) ["Miscellaneous crimes"] of this title,
> >
> > (C) is deportable under section 1227(a)(2)(A)(i) ["Crimes of moral turpitude"] of this title on the basis of an of-

> fense for which the alien has been sentenced to a term of imprisonment of at least 1 year, **or**
>
> (D) is inadmissible under section 1182(a)(3)(B) ["Terrorist activities"] of this title or deportable under section 1227(a)(4)(B) ["Terrorist activities"] of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) **Release.** The Attorney General may release ***an alien described in paragraph (1)*** only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness [. . .], and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. § 1226(c) (brackets and emphasis supplied). Thus, the mandatory detention provision of Section 1226(c) admits of only one exception as set forth in subsection (2), *i.e.*, where the need for witness protection exists. This exception is of no relevance to the instant case.

B. SUMMARY OF THE PARTIES' COMPETING INTERPRETATIONS

Petitioners argue that Section 1226(c) is plain in its mandate that "the Attorney General shall take into custody" an individual who has committed an enumerated offense "when the alien is released," not at some later date, but quite simply, at the moment of his or her release. Said differently, the Government is required to apprehend such individuals "when [they are] released," thus effecting a seamless transition from state to federal custody and ensuring their detention pending removal proceedings. Petitioners contend that because they were not apprehended by the Government when they were released from state custody, they do not fall within the scope of Section 1226(c)'s mandatory detention provision because they are not aliens "described in paragraph (1)." *See* 8 U.S.C. § 1226(c)(2). Rather, aliens "described in paragraph (1)" and consequently denied bond hearings are only those who: (i) commit a predicate offense, and (ii) are taken into custody "when [they are] released."

The Government advances a different interpretation of Section 1226(c), relying on *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). There, in a split decision, the BIA acknowledged that Section 1226(c) does require that custody occur "immediately upon [] release." *Rojas*, 23 I&N Dec. at 122. The BIA nonetheless ignored that mandate and determined that Section 1226(c)'s mandatory detention provision applies to any individuals who commit an offense enumerated in Section 1226(c)(1)(A)-(D) regardless of when the individual is apprehended. The Government argues that the BIA's interpretation of Section 1226(c) should be granted deference because the statute admits of ambiguity that the agency reasonably resolved. As further evidence that the statute is ambiguous, the Government posits that the term "when" can be understood to mean "at any time after" as well as "immediately upon." (Deft. Mot. to Dismiss at 15.) Thus, Government asserts that its practice of apprehending individuals at any point after they are released complies with Congress's directive.

C. ANALYSIS

1. Standard of Review

When Petitioners seek judicial review of the interpretation of a statute by an administrative agency, a court must apply the deferential test for evaluating an agency decision set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, a court must first inquire whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. If the statute is unambiguous the inquiry ends, for a court need not defer to an agency's interpretation of a statute "[i]f the intent of Congress is clear." *Id.* at 842. If the statute is found to be ambiguous or silent with respect to the specific issue, the court then evaluates "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The parties' dispute centers on the meaning of the phrase "when . . . released" as used in Section 1226(c). The Government asserts that the term "when" can be understood to mean "at any time after" as well as "immediately upon." Petitioners contend that the term can be read to mean only "immediately upon" or "at the moment of release." Thus, the Court first turns to the question of what the phrase "when . . . released" as set forth in Section 1226(c) means and whether it is ambiguous.

2. Whether Section 1226(c) is Ambiguous

When interpreting a statute, the Court must begin with the language of the statute itself. A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975); *see also Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (to interpret a statute, a court must give words their "ordinary or natural" meaning) (citation omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)).

Section 1226(c)(1) consists of one relevant and long sentence that, when read in a condensed form, provides clarity:

> The Attorney General ***shall*** take into custody any alien who—[has committed an enumerated offense], ***when the alien is released***, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c) (brackets and emphasis supplied). The primary question presented is whether "when . . . released" means immediately upon release or at any time after release. For three reasons, the Court finds that the former meaning controls.

First, the language itself establishes a mandate with an inherent immediacy requirement. By including the language "[t]he Attorney General ***shall***" in Section 1226(c), Congress issued a command that the Government take into custody such individuals at the moment they are released ("when . . . released") from state custody, not at some undefined time in the future. Such is the meaning of the term "when" as used in this manner. If one is commanded to do something "when" another event occurs, the term "when" cannot reasonably be read to permit potentially unbounded delay. The fact that there is a command, which admits of no discretion by its very nature, does not support the notion that the action commanded can be undertaken at the leisure of the subordinate party. Had Congress intended to provide the Government discretion as to when Section 1226(c)'s mandatory detention commences, it would not have used mandatory language. Instead, it would have enacted language such as "at any point after the alien is released" or "after the alien is released." The fact that no such language appears in the statute cannot be ignored. The Court cannot, and will not, strain to "read into" Section 1226(c) language that is simply not there, for to do so would be to contrive rather than to interpret. As it is written in Section 1226(c), "when . . . released" can be read only to mean at the time of release.

Second, reading Section 1226(c) as a single, cohesive sentence reveals that Congress had timing in mind when it enacted Section 1226(c). The "when . . . released" clause immediately precedes the clause "without regard to whether the alien is released on parole, supervised release, or probation." The nature of the individual's release—whether he or she is released on parole, supervised release, or probation—manifests at the moment of release. That Congress explicitly acknowledged events that occur *simultaneously* with an individual's release and stated that said events shall not bear on the Government's obligation to apprehend such individuals makes clear that said apprehension must occur at the moment the individual is released. Furthermore, the "when . . . released" command exists not only "without regard" to events that occur at the moment of release, such as the nature of that non-custodial release, but "without regard" to possible *future* events that have yet to manifest ("whether the alien may be arrested or imprisoned again for the same offense"). In this one sentence, Congress acknowledged both present and future possibilities and nonetheless required that the Attorney General "take into custody" such individuals "when [they are] released." Thus, by specifically choosing the word "when," as opposed to other terms such as "at any time after" or simply "after release," Congress emphasized that the directive was time-sensitive: the person must be taken into custody at the time of release from state custody and not at any point in time thereafter.

Third, that Section 1226(c) sets forth an immediacy requirement is further reinforced by assessing how Section 1226(c) interacts with the rest of Congress's statutory scheme. In Section 1226, Congress set forth a statutory framework for the detention of noncitizens pending removal proceedings. Section 1226(c)'s mandatory detention provision is an exception within that broader scheme. The more generally applicable provision, Section 1226(a), affords the Government both deference and discretion as to whether an individual is either detained pending removal proceedings or released on bond. In contrast, the language of 1226(c) eliminates that discretion where a certain class of individuals are concerned. To find that the Attorney General has potentially boundless discretion as to when it discharges its obligations under Section 1226(c) runs counter to the language and structure of Section 1226. Indeed, it is illogical: both the language and structure of Section 1226 establish that Congress's directive to the Government regarding apprehension of certain criminal aliens was both time-sensitive and non-discretionary.

Given the interplay between Sections 1226(a) and (c), it makes sense that the plain language of the statute commands the Attorney General to apprehend specified criminal aliens "when [they are] released," and no later. The individuals defined in Section 1226(c)(1)(A) through (D) are those who have committed criminal offenses and for whom removal was Congress's priority. Congress enacted a statutory scheme that contemplated immediate apprehension of these individuals upon release from state custody, thus effecting a *seamless transition* and ensuring effective and efficient removal. Reading Section 1226(c) in a manner that credits its plain meaning serves this logical, sensible purpose.

The Government's three arguments to the contrary are unpersuasive. First, the Government proposes that the meaning of the phrase "when the alien is released" is ambiguous because it can be read to establish the point in time when the Government's duty to apprehend a criminal alien *begins*. (*See* Dkt. No. 24 at 14; Dkt No. 32 at 11.) Under the Government's reading of the statute, its authority to "take into custody" an individual contemplated in Section 1226(c) begins at the moment the individual is released from state custody and may be discharged at the Government's discretion. That reading of the statute strains credulity. It runs counter to both the plain meaning of the term "when" as used in Section 1226(c)(1) and the structure of Section 1226 as a whole. As set forth above, Congress chose the word "when," not the word "after" or something similar. If the Government's duty merely begins at the point of release, the Government is free to ignore Section 1226(c)'s mandate indefinitely. This interpretation finds no support in Section 1226(c)'s language or Section 1226 generally. Indeed, it appears that the Government's argument is motivated by the fact the Government finds it difficult to comply with Congress's directive. This concern is unavailing. Practical difficulties cannot change or undermine the statute's plain language.

Second, the Government argues that the meaning of "when" is imprecise, citing dictionaries to show that the term can take on various meanings. (*See* Dkt. No. 24 at 15; Dkt. No. 32 at 12.) To support this argument, the Government points to cases in which other courts have found that the term "when" has at least two possible meanings, such as "at any time after" and "immediately upon." Although a term may potentially possess two meanings in other circumstances, it does not follow that the term therefore must be ambiguous as used in Section 1226(c). Such myopia has no place in statutory interpretation. A court must read the words of a statute "in their context and with a view to their place in the overall statutory scheme." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2001) (citations omitted); *see also United States v. Morton*, 467 U.S. 822, 828 (1984) ("[W]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.") (citations omitted).

Courts have long employed the canon of looking to the words surrounding the term at issue and the statutory structure in which the term is used to discern meaning, for "a word is known by the company it keeps." This canon, also known as *noscitur a sociis*, prevents a court from "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Taking a full view of Section 1226(c), with particular attention to the structure of the sentence at Section 1226(c)(1) and the relationship between Sections 1226(a) and (c), it is evident that "when" can mean only "at the moment" of release. To hold otherwise would read "unintended breadth" into Section 1226(c) by sanctioning the Government's practice of delaying apprehension of criminal aliens for months, years, or even decades after they are released from state custody.

Third, as an alternative argument, the Government submits that the phrase "when . . . released" cannot bear on the category of individuals subject to mandatory detention because those contemplated in subsection 1226(c)(1)(D) specifically would never have been subject to predicate custody. (Dkt. No. 32 at 13; Dkt. No. 45 at 1-2.). By extension, the Government posits that if the "when . . . released" requirement cannot apply literally to individuals falling within the scope of subsection (D), this Court should find that the "when . . . released" requirement applies to *no* individual contemplated in the entirety of Section 1226(c)(1)(A), (B), or (C). The argument does not convince, for it would have the effect of reading the "when . . . released" requirement out of the statute entirely. Moreover, the Government's suggestion that reading Section 1226(c) to require immediate apprehension would hamstring the Government's ability to detain individuals suspected of terrorist activity is unavailing as a practical matter. Section 1226(c) does not operate in a vacuum; there are other statutes that enable the Government to apprehend specifically individuals suspected of terrorist activities. *See, e.g.*, 8 U.S.C. § 1226(A) (entitled "Mandatory detention of suspected terrorists; habeas corpus; judicial review"). There is thus no practical concern that reading Section 1226(c) for what it says would render the Government unable to apprehend individuals contemplated by subsection (D).[6] In addition, it is not clear that reading Section

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[6] The Government's suggestion that reading the statute for what it says would in some way hinder its ability to detain individuals for subsection (D) offenses pursuant to Section 1226(c) appears disingenuous in light of the fact that in response to the Court's order that the Government provide figures on the size of the potential class, the Government responded with data concerning individuals held pursuant to offenses enumerated in only subsections (A)

1226(c) for what it says presents an inherent contradiction by referring to subsection (c)(1)(D) individuals and requiring that there be predicate custody. Ostensibly, individuals falling within the ambit of subsection (D) could be subject to custody for an unrelated offense, serve time in state custody for that non-subsection (D) offense, and "when . . . released," be apprehended by the Government for activities falling under subsection (D). Thus, the Government's suggestion that there can be no sensible reconciliation of "when released" with the individuals contemplated by subsection (D) falls flat.

In sum, the Court finds that the plain reading of the statute supports Petitioners' interpretation. "When . . . released" means what it says: an individual falls within Section 1226(c) if detained at the time he or she is released from state custody. In so holding, the Court is in good company. Although the Ninth Circuit has yet to rule on this question, "[t]he majority of district courts in this [] circuit[ ] hold that the 'when . . . released' language is unambiguous," and that the mandatory detention provision applies to only individuals who have both committed an enumerated offense and are detained upon their release. *Deluis-Morelos v. ICE Field Office Dir.*, 2013 WL 1914390, at *4 (W.D. Wash. May 8, 2013); *see, e.g.*, *Khoury v. Asher*, No. 13-cv-1367, Dkt. No. 44 (W.D. Wash. Mar. 11, 2014); *Espinoza v. Aitken*, 2013 WL 1087492, at *6 (N.D. Cal. Mar. 13, 2013) (holding "when . . . released" lan-

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through (C). The Government did not provide any figure reflecting the number individuals currently held under Section 1226(c) for subsection (D) offenses. (*See* Dkt. No. 46 ("Joint Submission") at 10.)

guage limits scope of mandatory detention provision to criminal aliens detained when released where detainee was arrested by ICE six months after conviction and sentence of probation and time served); *Bumanlag v. Durfor*, 2013 WL 1091635 (E.D. Cal. Mar. 15, 2013) (holding same where detainee was arrested by ICE seven years after release from prison); *Dighero-Castaneda v. Napolitano*, 2013 WL 1091230, at * 6 (E.D. Cal. Mar. 15, 2013) ("8 U.S.C. § 1226(c) does not apply unless the petitioner is taken into custody immediately or very shortly following his or her release from custody on the underlying removable offense."); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1229-30 (W.D. Wash. 2004) (holding same). Many courts outside this circuit have similarly found that the language "when . . . released" unambiguously requires an individual to have been detained upon release from criminal custody for an offense enumerated by Section 1226(c)(1) in order to be subject to mandatory detention under Section 1226(c). *See e.g.*, *Gordon v. Johnson*, 2013 WL 6905352 (D. Mass. Dec. 31, 2013); *Castaneda v. Souza*, 952 F. Supp. 2d 307, 317-318 (D. Mass. 2013); *Valdez v. Terry*, 874 F. Supp. 2d 1262, 1264 (D. N.M. 2012) (collecting cases demonstrating that the "*majority* of federal district courts that have ruled on this issue have agreed that the language 'when the alien is released' in § 1226(c) unambiguously means immediately after their release" and have rejected the BIA's interpretation of § 1226(c) in *Matter of Rojas*) (emphasis in original); *Ortiz v. Holder*, 2012 WL 893154, *3 (D. Utah Mar. 14, 2012) (joining the "vast majority of federal courts that have addressed this issue" and holding that because petitioner was not taken into immigration custody when he was released, Section 1226(c) does not apply).

Accordingly, for the reasons set forth above, the Court finds that Section 1226(c) unambiguously requires that individuals be detained immediately upon release from custody in order to be subject to Section 1226(c)(2)'s mandatory detention provision. If individuals are not detained "when [they are] released" from state custody, the Government may detain them pending removal proceedings pursuant to Section 1226(a), which requires that they be afforded a bond hearing.

3. Section 1226(c)'s Legislative History Confirms Its Plain Meaning

Although the Court's analysis can end at this juncture, it bears noting that the political context in which Section 1226 was enacted confirms that the plain language of the statute requires apprehension at the time of release and no later. In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court considered the constitutionality of Section 1226(c)'s mandatory detention provision and provided a fulsome explication of the statute's origin. There, the Supreme Court found that Congress enacted Section 1226(c) "against a backdrop of wholesale failure by the [Immigration and Naturalization Service ("INS")][7] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518 (citing Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 103d Cong., 1st Sess. (1993); S. Rep. No. 104-48, p. 1 (1995) (confinement of criminal aliens alone cost $724 million in 1990)). Having undertaken to determine how to ensure that such individuals would assuredly be deported, Congress's investigations revealed infirmities in INS's processes. For example, Congress learned that "the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country." *Demore*, 538 U.S. at 518 (emphasis in original) (citation omitted). The result was not simply a monetary cost on the Nation, but also a cost on other potential immigrants who sought to enter the United States and on the public due to the crimes such individuals committed before being removed. *Id.* The Supreme Court further noted that "deportable criminal aliens who remained in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Id.* at 518-19 (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)). Given this context, it makes sense that Congress wanted to ensure that certain criminal aliens would not be released following time served for certain offenses. Reading Section 1226(c) for what is says furthers that goal by ensuring a seamless transition from state to federal immigration custody and ensuring efficient removal proceedings for certain offenders.

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[7] On March 1, 2003, the INS ceased to exist as an independent agency within the Department of Justice, and ICE, an agency within DHS, assumed INS's detention and removal authority.

Cognizant that Section 1226(c)'s new seamless transition mandate would require the INS to change considerably its policies and procedures, Congress passed the Transition Period Custody Rules ("TPCR") concurrently with Section 1226(c). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(b)(2), 110 Stat. 3009, 3009-586 (Sept. 30, 1996). The TPCR suspended the implementation of the mandate in Section 1226(c) for one year to provide the INS time to implement necessary changes. *See Matter of Garvin-Noble*, 21 I&N Dec. 672, 675, 678 (BIA 1997) ("Congress evidently preferred mandatory detention pending deportation but understood that detention space and other practical limitations temporarily stood in the way of that preference.")

In light of Congress's objectives in enacting Section 1226(c), specifically remedying the Government's failure to detain and remove a subset of criminal aliens, it is illogical to read Section 1226(c) as permitting potentially limitless delay in their apprehension. Doing so would have the practical effect of rendering the detention contemplated by Section 1226(c) discretionary in the first instance, for the Government could simply choose to delay apprehension indefinitely. Taken to its extreme, this reading of Section 1226(c) would effectively sanction the Government's "wholesale failure" to deal effectively with and remove criminal aliens. *See Demore*, 538 U.S. at 518. The one-year suspension of Section 1226(c) suggests all the more that Congress intended to require seamless transition from state to federal custody "when" such individuals are released from state custody.[8] Congress's intent, evident from the plain language of the statute and reinforced by the context in which it was passed, was that Section 1226(c) would function as a mandate, effecting seamless transitions from custody to immigration detention for a select class of deportable persons for whom removal was Congress's priority.[9] The Government's inability to follow this mandate does not change the statute's plain language nor can it be a basis for broadening the Government's authority. To hold otherwise would not only do violence to the statute, it would have the perverse effect of validating the Government's failure to comply.

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[8] The Government argues that the TCPR provided the Government time to implement the processes required for Section 1226(c)'s mandatory detention requirement, not to perfect that process. The Government further argues that practical considerations, such as sanctuary city ordinances and limited federal resources, render seamless transition from state to federal custody difficult. These arguments are unavailing. As explained above, Congress made clear that the Government "shall take into custody" the individuals in question "when [they are] released." The fact that the Government fails to comply with this mandate is not a reason for this Court to interpret Congress's language as sanctioning such noncompliance.

[9] Indeed, after enacting Section 1226(c), Congress remained apprised the INS's efforts to identify and remove criminal aliens. To that end, the General Accountability Office provided reports and testimony. In 1997, the GAO provided to the House Committee on the Judiciary a report, entitled "Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved." GAO/T-GGD-97-154 (July 15, 1997). The GAO provided a follow-up to that report in 1998, entitled "Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement." GAO/GGD-99-3 (October 1998). And in 1999, the GAO provided testimony to the same effect. *See* GAO/T-GGD-99-47 (February 25, 1999) ("1999 Testimony"). Although these reports concerned primarily the INS's effectuation of Institutional Hearing Program procedures, whereby removal proceedings would be initiated and completed for criminal aliens while in state or federal custody, the reports are notable for their consistent acknowledgement of INS's chronic failure to even *identify* criminal aliens while they are in state custody in the first place, and furthermore, for INS's

4. The Government's Remaining Arguments Do Not Persuade

a. *Matter of Rojas* does not merit any deference

Having found that Section 1226(c) is unambiguous, it thus follows that the BIA's decision upon which the Government relies, *Matter of Rojas*, merits no deference under *Chevron*. However, in the interest of clarity and completeness, the Court will now address the myriad other reasons why *Rojas* cannot stand.

As an initial matter, the BIA's framing of the question presented in *Rojas* differed from the question before this Court. In *Rojas*, the dispositive question was not whether the language "when the alien is released" in Section 1226(c) is ambiguous. To the contrary, BIA expressly concluded that the "when . . . released" language *was not* ambiguous: Section

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failure to take said individuals into custody "upon their release from prison." (*See* 1999 Testimony at 2 ("As was the case when we reported to this Subcommittee in July 1997, we again found that INS . . . did not fully comply with the legal requirements that it . . . (2) take [criminal aliens who had committed aggravated felonies] into custody upon their release from prison"); *id.* at 6 ("INS still is not doing all it should to ensure that it is initiating removal proceedings for aggravated felons and taking them into custody upon their release from prison.") (*See also* Dkt. No. 39.)

1226(c) "does direct the Attorney General to take custody of aliens ***immediately upon their release*** from criminal confinement." *Rojas*, 23 I. & N. Dec. at 122 (emphasis supplied). Instead, the BIA focused on the language of Section 1226(c)(2), which defines the category of persons to whom the mandatory detention provision applies, *i.e.*, as those "alien[s] described in paragraph (1)." Thus, the BIA sought to determine whether the "alien described in paragraph (1)" referred to: (1) individuals who have committed offenses enumerated in paragraphs (1)(A) through (1)(D), or (2) those same individuals but who were also detained "when . . . released" from state custody. *See Rojas*, 23 I. & N. Dec. at 125. The *Rojas* court opted for the former. *Id.* ("We construe the phrasing 'an alien described in paragraph (1),' as including only those aliens described in subparagraphs (A) through (D) of section 236(c)(1) of the Act, and as not including the 'when released' clause.").

A closer look at the analysis presented in *Rojas* reveals its infirmity. It is a "'cardinal principle of statutory interpretation' [] that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1995) ("It is our duty to give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted); *Rojas*, 23 I&N at 134 (Rosenberg, J., dissenting) (citing *Menasche*, 348 U.S. 528). While the *Rojas* majority recognized that the phrase "when . . . released" created an immediacy requirement, it then read that requirement out of the statute entirely. *See Rojas*, 23 I. & N.

Dec. at 125. In so doing, the BIA rendered the "when . . . released" clause entirely superfluous.

As explained above, the structure of Section 1226(c) does not support the notion that the "when . . . released" clause is an excisable part of the statute. "Paragraph 1" is only one sentence long; "when . . . released" is an inextricable part of the sentence. The task of interpreting a statute does not present an opportunity for a reviewing body to determine which of Congress's words are necessary and which may be ignored. All of Congress's words are assumed to serve a purpose; it is the Court's role to determine what those words mean. Where, as here, the BIA found the terms "when . . . released" to have one clear meaning—to provide a mandate that the Attorney General apprehend a class of individuals ***immediately upon their release*** from criminal confinement—the BIA was not free to find the "when released" language unnecessary and thereby administratively eviscerate Congress's mandate.

For good reason, the cases that rely upon *Rojas* are few. The most prominent of these is the Fourth Circuit decision, *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012). There, in a short decision, the Fourth Circuit referred to a dictionary definition of the word "when" and concluded that because the term in isolation can be read to have different meanings, it therefore was ambiguous as used in Section 1226(c). *See Hosh*, 680 F.3d at 379-80 ("'[W]hen' in § 1226(c) can be read, on one hand, to refer to 'action or activity occurring 'at the time that' or 'as soon as' other action has ceased or begun.'" *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007) (citing 20 *The Oxford English Diction-*

ary 209 (2d ed. 1989); *The American Heritage Dictionary of the English Language* (4th ed. 2000)). On the other hand, 'when' can also be read to mean the temporally broader 'at or during the time that,' 'while,' or 'at any or every time that . . . .' *Free Merriam-Webster Dictionary, available at* http://www.merriam-webster.com/dictionary/when (last visited April 30, 2012)."). It therefore deferred to the BIA's interpretation.

The Fourth Circuit decision did not examine the structure of Section 1226(c) and the meaning of the word "when" in that context, or the relationship between the mandatory detention requirements set forth in Section 1226(c) and the permissive detention requirements set forth in Section 1226(a). *Cf. Brown & Williamson*, 529 U.S. at 132-33. Nor did the Fourth Circuit evaluate the nature of the BIA's reasoning in *Rojas*, its application of canons of statutory interpretation, or its concession that the term "when . . . released" was *not* ambiguous. *See Bogarin-Flores v. Napolitano*, 2012 WL 3283287, at *3 (S.D. Cal. Aug. 10, 2012) (finding *Hosh* unpersuasive as it failed to "present any independent reasoning or statutory construction"); *Baquera v. Longshore*, 948 F. Supp. 2d 1258, 1263 (D. Colo. 2013) ("Presumably because of the inadequacy of the analysis in *Rojas* and the dearth of analysis in *Hosh* itself, *Hosh* has had little persuasive impact beyond the Fourth Circuit . . . . ").

Accordingly, the Court declines to accord persuasive weight to *Hosh*, and rejects *Rojas* as inconsistent with Section 1226(c)'s plain language and as an unreasonable application of the canons of statutory construction.

b. The "loss of authority" doctrine does not apply

Other courts have reached the same practical conclusion as *Rojas* but on different grounds. The Third Circuit's ruling in *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013) is the most prominent. There, citing the Supreme Court's decision in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), the Third Circuit avoided the need to determine whether Section 1226(c) contained any ambiguity by relying on the "loss of authority" doctrine to find that the Government does not lose its authority to detain individuals under Section 1226(c) even if it fails to detain them "when . . . released." *See Sylvain*, 714 F.3d at 157 ("We need not take a stand on this issue. Even if the statute calls for detention 'when the alien is released,' and even if 'when' implies something less than four years, nothing in the statute suggests that immigration officials lose authority if they delay."); *see also Hosh*, 680 F.3d at 381-82 (noting that although the statute was ambiguous and the BIA's decision correctly decided, even were it not so, the Government would retain its authority to apprehend an individual long after the date of release from custody under the "loss of authority" doctrine). Thus, these courts have found that the Government's obligation to apprehend an individual who has committed an offense enumerated in Section 1226(c)(1)(A)-(D) may be discharged at any point after the individual is released.

As an initial matter, it bears noting that the application of this doctrine effectively "reads out" of the statute the "when . . . released" language, which for all the reasons explained above is an undesirable result.

But beyond that, the case upon which the Government relies, *Montalvo-Murillo*, is distinguishable and therefore inapplicable to the question at hand. In *Montalvo-Murillo*, the Supreme Court addressed whether the Government lost authority to seek pretrial detention of an individual pending his criminal trial if it did not timely request a hearing. 495 U.S. at 713-14. There, a magistrate judge ordered the criminal suspect released on bond. After a *de novo* detention hearing, the district court disagreed and found that the suspect was a flight risk. The district court nevertheless ordered the suspect released because the detention hearing had not been held "upon the person's first appearance," as required by the Bail Reform Act of 1984. 18 U.S.C. § 3142(f) (West 1990).[10] The Tenth Circuit affirmed, and the Supreme Court reversed.

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[10] The relevant language from the Bail Reform Act at issue in *Montalvo-Murillo* was as follows:

> (e) **Detention.** If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.
>
> * * *
>
> (f) **Detention hearing.** The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community—
>
> * * *

The Supreme Court found that although there was a "vital liberty interest" at stake, "the Act is silent on the issue of a remedy for violations of its time limits. Neither the timing requirements nor any other part of the Act can be read to require, or even suggest, that a timing error must result in release of a person who should otherwise be detained." *Montalvo-Murillo*, 495 U.S. at 716-17. Accordingly, the Court held that "a failure to comply with the first appearance requirement does not defeat the Government's authority to seek detention of the person charged." *Id.* at 717. In so holding, the Court relied on the "'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'" *Id.* at 718 (quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (quotation marks omitted)).

Unlike the facts of the instant case, the circumstances of *Montalvo-Murillo* created a stark choice: finding that the government's authority to detain expired if the statutory timeline was missed would result in release of an individual who had been deemed a flight risk. The public would bear the cost of the Government's delay, and that cost would be substantial. But unlike the Bail Reform Act provision in *Montalvo-Murillo*, Section 1226 does not lack for a remedy in the event that the Government fails to apprehend an indi-

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> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance.

18 U.S.C. § 3142(e)-(f) (West 1990)); *see Gutierrez v. Holder*, 2014 WL 27059, at *5-6.

vidual "when [he or she is] released" from state custody as required under Section 1226(c). In the event that the Government fails to apprehend an individual promptly, the individual does not automatically become "immune from detention." *Compare Montalvo-Murillo*, 495 U.S. at 722. Rather, the individual remains subject to detention pursuant to Section 1226(a), which entitles him or her to a bond hearing. Thus, the Government retains its ability to detain individuals like Petitioners, it simply has to afford them a bond hearing as required by Section 1226(a). If determined to be a flight risk or a threat to public safety, detention pending removal proceedings remains proper; there is no "threat that we must embarrass the system by releasing a suspect certain to flee from justice." *See id.* at 721.

The Government argues that if Section 1226(c) is read to require that the Government effect a seamless transition from federal to state custody, Petitioners would receive the undue "windfall" of a bond hearing. The Government further argues that holding the Government to the immediacy requirement in Section 1226(c) would effect a sanction on the public. These arguments are unpersuasive. Providing such individuals a bond hearing can hardly be said to constitute a "windfall." First, affording a bond hearing *is* the general rule; the lack thereof pursuant to Section 1226(c) is the exception. Second, the Ninth Circuit has held that individuals such as Petitioners must receive a bond hearing after six months of detention *even if they are properly detained* pursuant to Section 1226(c). *See Rodriguez II*, 715 F.3d at 1138. Third, it cannot be seriously argued that requiring the Government to provide individuals such as Petitioners bond hearings impinges the public interest. The individuals at issue will not be released unless they can demonstrate that they are not a flight risk or danger to the public.[11]

* * * *

For all the reasons set forth above, the Court holds that the "when . . . released" clause of Section 1226(c) means what it says. Individuals who have committed an offense enumerated at Section 1226(c)(1)(A)-(D) must also be detained by the Government at the time they are released from criminal custody in order to be subject to the mandatory detention provision in Section 1226(c)(2). The Government's practice of subjecting to mandatory detention individuals who were not apprehended when released from state custody runs afoul of Congress's clear command.

The parties having conceded that their respective motions rise and fall with the resolution of this critical issue, Petitioners' Motion for Preliminary Injunction is granted and the Government's Motion to Dismiss is denied. The Court now considers Petitioners' Motion for Class Certification.

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[11] According to the parties' Joint Submission following oral argument, ICE currently detains between 200 and 300 individuals under Section 1226(c) in the prospective class who were not transferred directly from criminal custody into immigration detention for the crime(s) for which they are removable under subparagraphs (A) through (C). The Court notes that this figure does not account for any individuals held under subparagraph (D). (*See* Joint Submission at 10.) Further, according to the Declaration of Michael Tan, counsel for petitioners in *Rodriguez v. Robbins*, Case No. CV-07-3239, in a one-month period following issuance of an injunction in that case, the Government held 171 bond hearings. (Dkt. No. 47, Ex. A at 3.)

IV. MOTION FOR CLASS CERTIFICATION

Petitioners seek to certify as a class:

> Individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the Government immediately upon their release from criminal custody for a Section 1226(c)(1) offense.

(*See* Dkt. No. 8 at 1; Dkt. No. 47 at 9-10.)[12] Petitioners also ask that they be named as representative plaintiffs and that their counsel be appointed class counsel.

A. LEGAL STANDARD

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)) (internal quotation marks omitted). The party seeking class certification bears the burden of demonstrating by a preponderance of the evidence that all four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—and at least one of the three requirements under Rule 23(b) are met. *Wal-Mart*, 131 S. Ct. at 2551 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). While the Court retains broad discretion to certify a class, the Court must conduct a "rigorous analysis" to confirm that the plaintiff has in fact established the requirements of Rule 23 to ensure that a departure from the general rule of individual litigation is justified. *General Tel. Co. v. Falcon*, 457 U.S. 147, 160-61 (1982). "While ordinarily disfavored, the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus." *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) ("*Rodriguez I*") (citations omitted).

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[12] The proposed class does not include individuals in custody for Section 1226(c) offenses who were transferred to criminal custody outside the state of California, nor does it include individuals held outside the state of California under the authority of ICE field directors in the state of California, because such individuals are not, or have not yet been, detained in immigration custody in California pursuant to Section 1226(c). (Dkt. No. 47 at 9-10.) Nor does it include individuals detained pursuant to Section 1226(c) who were not apprehended immediately upon release from custody but who have already been afforded bond hearings.

In order to certify a proposed class, the Court must find that the moving party has complied with the prerequisites of both subparts (a) and (b) of Fed. R. Civ. P. Rule 23. The Court addresses each part in turn.

B. APPLICATION OF RULE 23(A)

1. Numerosity

Plaintiffs satisfy Rule 23(a)(1)'s numerosity requirement if "the class is so large that joinder of all members is impracticable." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 506 (N.D. Cal. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *see also Davis v. Astrue*, 250 F.R.D. 476, 485 (N.D. Cal. 2008) ("As a general rule, classes numbering greater than 41 individuals satisfy the numerosity requirement.") (citing 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.22 [1] [b] (3d ed. 2004)).

The numerosity requirement has been met in this case. The Government concedes that ICE currently detains between 200 and 300 individuals in California pursuant to Section 1226(c) who were not detained by ICE immediately upon release from criminal custody for their 1226(c)(1) offenses. (*See* Joint Submission at 10.) Thus, the Court finds that Petitioners have satisfied Rule 23(a)(1)'s numerosity requirement. *See Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008) (finding numerosity requirement satisfied where plaintiffs only identified 22 potential class members); *Santillan v. Ashcroft*, 2004 WL 2297990, at *9 (N.D. Cal. Oct. 12, 2004).

2. Commonality

"Commonality requires that the class members' claims depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (citation and quotation marks omitted). "Rule 23(a)(2) has been construed permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "[T]he key inquiry is not whether the plaintiffs have raised common questions . . . but rather, whether class treatment will 'generate common *answers* apt to drive the resolution of the litigation.'" *Abdullah*, 731 F.3d at 957 (quoting *Wal-Mart*, 131 S. Ct. at 2551). "This does not, however, mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is 'a single *significant* question of law or fact.'" *Id.* (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 582, 589 (9th Cir. 2012)).

The Court finds that Petitioners have demonstrated sufficient commonality to satisfy Rule 23(a)(2) because the resolution of one single question—whether Section 1226(c) requires immediate detention by ICE or whether Section 1226(c) permits the Government's practice of delaying apprehension—will resolve "in one stroke" all class members' claims. *See Rodriguez I*, 591 F.3d at 1122-24 (finding commonality even though class members were detained pursuant to different statutes and under different factual circumstances because a single question—whether a bond hearing was required for individuals detained longer than six months—was "posed by the detention of every member of the class and their [individual claims would] largely be determined by its answer"). As Petitioners argue, and as the Government conceded at the hearing on these motions, this Court's decision on the merits of Petitioners' statutory interpretation claim would effectively and efficiently resolve the claims of all potential class members "in one stroke." Further, in keeping with the purpose of class action litigation, settling this common question would "render management of [proposed members'] claims more efficient for the courts" and "would also benefit many of the putative class members by obviating the severe practical concerns that would likely attend them were they forced to proceed alone." *Rodriguez I*, 591 F.3d at 1123.

3. Typicality

"The typicality requirement looks to whether the claims of the class representatives are typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Rodriguez I*, 591 F.3d at 1124 (citation and internal quotation marks omitted). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon*, 976 F.2d at 508 (quotation omitted). "Where the challenged conduct is a policy or practice that affects all class members . . . the cause of the injury is the same"; thus, the analysis requires "comparing the injury asserted in the claims raised by the named plaintiffs with those of the rest of the class." *Davis*, 275 F.3d at 868-69.

The Court finds the typicality requirement satisfied. All class members were detained pursuant to Section 1226(c) and therefore denied individualized bond hearings despite the existence of a gap between their release from state custody and federal detention. (Dkt. No. 8 at 12-13.) Petitioners' claims are typical of those of the potential class members, as both Petitioners' claims as well as those of the proposed class result from the Government's alleged misapplication of Section 1226(c). The injury alleged—detention without a bond hearing pursuant to Section 1226(c) despite the fact that Petitioners were not detained immediately upon release—is the same injury suffered by all of the proposed class members. The remedy sought—a declaration by this Court that Section 1226(c) requires immediate detention and an order granting bond hearings for class members—is a remedy all class members share.

The Government's counterarguments are unavailing. The differences in each Petitioner's gap between release and detention, legal non-citizen status, and challenges each class member may face in a bond hearing are irrelevant to the analysis because "[t]he particular characteristics of the Petitioner[s] or any individual detainee will not impact the resolution of [the] general statutory question and, therefore, cannot render Petitioners' claim atypical." *Rodriguez I*, 591 F.3d at 1124; *see also Santillan*, 2004 WL 2297990, at *11 (noting that the relative differences in time that class members had to wait for the Government to process immigration status updates were "immaterial for purposes of class typicality, which is concerned with the class members' shared interests and harms") (citing *Falcon*, 457 U.S. at 156).

4. Adequacy of Class Representation

"To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon*, 150 F.3d at 1020. "To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (citation and quotation marks omitted). "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Products*, 521 U.S. at 625-26 (internal quotation marks omitted).

The Government does not contest that Petitioners and their counsel will prosecute the action vigorously. Rather, the Government focuses on the first prong and argues that Petitioners are not adequate representatives because their interests conflict with those of potential class members. (Dkt. No. 25 at 12.) The Court disagrees.

Typically, conflicts of interest arise in situations where one group of class members seeks relief that would not benefit, or would be to the detriment of, other class members. *See Amchem Products*, 521 U.S. at 625-27 (finding a conflict of interest where a single class included one group of class members who sought immediate settlement payments to be derived from the same fund that would provide for other members who sought future payments). Here, despite the Government's assertions that the hypothetical differences between Petitioners and potential class members, the Court finds that there is no conflict of interest that would prevent Petitioners from adequately representing the class. Petitioners' statutory interpretation claim does not depend on the length of time between Petitioners' release and detention; Petitioners' claim concerns pure statutory interpretation. Petitioners here seek injunctive and declaratory relief that would benefit all proposed class members. *See Santillan*, 2004 WL 2297990, at *12. A decision on the merits that the Government's interpretation of Section 1226(c) is incorrect and that the class members are entitled to bond hearings would benefit all proposed class members. *See also Rodriguez I*, 591 F.3d at 1125 (certifying class consisting of aliens indefinitely detained without bond hearings pursuant to several immigration laws). Accordingly, the Court finds that Petitioners have satisfied Rule 23(a)(4).

C. APPLICATION OF RULE 23(b)

In addition to satisfying the Rule 23(a) requirements, Petitioners must establish that the proposed class meets the requirements of one class type described in Rule 23(b). FED. R. CIV. P. 23(b)(1)-(3). Petitioners seek certification as a Rule 23(b)(2) class.

To certify a 23(b)(2) class, the Court must find that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). Ordinarily, it follows that there is no need "to undertake a case-specific inquiry into whether class issues must predominate or whether class action is the superior method of adjudicating the dispute" as necessary for the other subsections of Rule 23(b). *Wal-Mart*, 131 S. Ct. at 2558. Rather, "[p]redominance and superiority are self-evident." *Id.*

The Government does not contest that it has acted or refused to act on grounds that apply generally to the class. Nor does the Government contend that the Rule 23(b)(2) class-type is inappropriate in this action. Nonetheless, the Court has undertaken a "rigorous analysis" to ensure the requirement is met.

The Court finds that the proposed class meets the Rule 23(b)(2) requirements. Petitioners and proposed class members have been detained and held without bond hearings pursuant to Section 1226(c) despite the fact that they were not detained immediately "when . . . released" from state custody. Thus, there is no question that Petitioners challenge a uniform Government policy that applies generally to the class, thereby satisfying the first part of Rule 23(b)(2). *See Rodriguez I*, 591 F.3d at 1126 (certifying 23(b)(2) class seeking to challenge government policy of indefinite detention of aliens, finding it sufficient that "class members complain of a pattern or practice that is generally applicable to the class as a whole") (citation omitted). As for relief, Petitioners seek a declaration that Section 1226(c) requires immediate detention upon release from predicate custody and injunctive relief in the form of bond hearings for class members. Because Petitioners seek only injunctive and declaratory relief and a single remedy would provide relief for each class member, the proposed class is appropriate for 23(b)(2) certification. *See Wal-Mart*, 131 S. Ct. at 2557 ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class."); *Rodriguez I*, 591 F.3d at 1126 ("[A]ll class members seek the exact same relief as a matter of statutory or, in the alternative, constitutional right. Hence, we conclude that the proposed class meets the requirements of Rule 23(b)(2).”). Thus, the Court finds that Petitioners satisfy the requirements of Rule 23(b)(2).

V. CONCLUSION

For all the reasons set forth above, the Court finds that the Government’s practice of subjecting to mandatory detention individuals who have committed an offense enumerated at Section 1226(c)(1)(A)-(D) but who were not apprehended “when released” from state custody violates the plain language of Section 1226(c). Petitioners’ Motion for Preliminary Injunction is **GRANTED**. The Government’s Motion to Dismiss is **DENIED**. Furthermore, Petitioners’ Motion for Class Certification is **GRANTED**.

Accordingly, the Court **ORDERS** as follows:

Within 7 days of the entry of this Order, the parties shall provide to the Court either: (1) a joint proposed Redetermination Notice form, or (2) their individual proposed Redetermination Notice forms. Such proposed notices shall include a statement in plain language that the individual has been reevaluated and is no longer subject to mandatory detention pursuant to Title 8 U.S.C. section 1226(c). The notices shall further include in plain language the result of the noncitizen’s custody reevaluation and whether the Department of Homeland Security (“DHS”) has determined that the individual should be released on his own recognizance, on Intensive Supervision Appearance Program, or on bond, and if on bond, the amount of the bond that DHS has set. Such notices shall be accompanied by an I-286 Form as well as instructions for requesting a hearing to challenge DHS’s custody reevaluation through a bond hearing pursuant to Title

8 U.S.C. section 1226(a), and also notify the individual that should he or she not specifically request a bond hearing, one will be automatically scheduled unless he or she affirmatively declines to have a bond hearing.

IT IS SO ORDERED.

Date: **May 15, 2014**

/s/ **YVONNE GONZALEZ ROGERS**
YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C13-1367RAJ

BASSAM YUSUF KHOURY, ET AL., PLAINTIFFS

v.

NATHALIE ASHER, ET AL., DEFENDANTS

[Filed: Mar. 11, 2014]

ORDER

Honorable RICHARD A. JONES

I. INTRODUCTION

This matter comes before the court on three motions: Plaintiffs' motion to certify a class, their motion for a preliminary injunction on behalf of that class, and Defendants' motion to dismiss for failure to state a claim. Although the parties requested oral argument, oral argument is unnecessary as to the rulings the court makes in this order. For the reasons stated below, the court GRANTS Plaintiffs' motion for class certification (Dkt. # 2) and DENIES Defendants' motion to dismiss (Dkt. # 28). The court directs the clerk to TERMINATE Plaintiffs' motion for a preliminary injunction. Dkt. # 14. The parties shall meet and confer in accordance with this order to determine if

Plaintiffs are satisfied that the declaratory relief that the court issues today will suffice to afford complete relief to Plaintiffs and the class they represent. If necessary, the court will conduct a hearing to determine whether to impose a permanent injunction to ensure that Defendants heed the court's declaratory ruling.

II. BACKGROUND

A. Plaintiffs Were Each Subject to Mandatory Detention As a Result of the Department of Homeland Security's Interpretation of 8 U.S.C. § 1226(c).

The federal government routinely locks away certain aliens who are in removal proceedings, denying them bond hearings via the so-called "mandatory detention" authority in a provision of the Immigration and Naturalization Act ("INA"). 8 U.S.C. § 1226(c)(2). Department of Homeland Security ("DHS") officials arrest these aliens; the Department of Justice immigration courts who oversee the confinement of aliens deny them bond hearings. In the government's view, an alien who has committed an offense on a list at § 1226(c)(1) is subject to mandatory detention pending the resolution of removal proceedings. There can be no serious question that some of these aliens present no risk to their communities and no risk of flight, because some of them have been living in this country for decades and have families and careers. What the government thinks about a law that locks away peaceable family members without release, the court can only guess. What is certain is that the government takes the position that Congress tied its hands when it enacted the mandatory detention scheme. It asserts that it *must* detain these aliens without bond, regardless of whether that is remotely sensible immigration policy. But this case is not about whether mandatory detention makes sense; it is about whether the government properly interprets the detention mandate of § 1226(c). The government's interpretation follows the interpretation of the Board of Immigration Appeals ("BIA") in *In re Rojas*, 23 I. & N. Dec. 117, 125 (BIA 2001), where the BIA determined that any alien who had committed a listed offense was subject to mandatory detention pending the completion of removal proceedings.

The Plaintiffs in this case are aliens who DHS locked away in the Northwest Detention Center ("NWDC"), an alien detention facility located in this judicial district. DHS locked Bassam Yusuf Khoury away in April 2013, and did not release him on bond until October 2013. DHS locked Alvin Rodriguez Moya away in April 2013, and did not release him on bond until October 2013. DHS locked Pablo Carrera Zavala away in April 2013 and released him on bond in August 2013 after it decided that he was not actually subject to mandatory detention. Asher Decl. (Dkt. # 36-1) ¶ 9. DHS commenced removal proceedings for each Plaintiff at about the time it took them into custody. So far as the court is aware, those proceedings have not reached a resolution even though they have been pending for nearly a year.

At the risk of understatement, the court observes that locking people up without bond hearings presents substantial Due Process concerns. The Supreme Court has held that the mandatory detention scheme of § 1226(c) is not a per se violation of the Due Process Clause of the Fifth Amendment. *Demore v. Kim*, 538 U.S. 510, 531 (2003). The Court grounded its holding, however, in its view that the average period of mandatory detention would be six weeks (the average time to complete removal proceedings in which the alien did not appeal) or "about five months" (in the event that the alien appealed an adverse removal ruling). *Id.* at 530. In *Rodriguez v. Robbins*, 715 F.3d 1127, 1137 (9th Cir. 2013), the court detailed Ninth Circuit rulings establishing that "*Demore*'s holding is limited to detentions of brief duration." In light of those rulings, the *Rodriguez* court upheld an injunction requiring aliens subject to mandatory detention within the Central District of California to receive a bond hearing within six months, and to be released on bond unless the government demonstrates that the alien presents a danger to the community or a risk of flight. *Id.* at 1131. It the government's apparent deference to *Rodriguez* and the precedent cited therein that allowed Mr. Khoury and Mr. Rodriguez to win release on bond after six months of mandatory detention.

Release after six months of mandatory detention is better than no release at all, but Plaintiffs argue that it is unlawful nonetheless. To understand their argument and the government's counterargument, the court considers in detail Plaintiffs' encounters with the mandatory detention scheme of § 1226(c).

Each Plaintiff committed a state crime, was convicted, and served his sentence. Each was released. Each returned to his family and community. Each was arrested years later by agents from Immigration and Customs Enforcement ("ICE"), an agency within DHS. Mr. Khoury, a native of Palestine and lawful permanent resident of the United States since 1976, was released from state custody in June 2011 after serving a 30-day sentence on a drug charge. ICE agents arrested him in April 2013. Mr. Rodriguez, a native of the Dominican Republic and a lawful permanent resident of the United States since 1995, served the non-suspended portion of a three-year sentence on a drug charge and was released in August 2010. ICE agents arrested him in April 2013. Mr. Carrera, a native of Mexico who has lived in the United State since 1998, finished a 60-day sentence in February 2003. ICE agents arrested him in April 2013.

No one disputes, at least for purposes of this case, that Plaintiffs were deemed removable for committing crimes within the scope of 8 U.S.C. § 1226(c), the subsection of the INA that authorizes mandatory detention. Congress amended § 1226 as part of the Illegal Immigration Reform and Immigration Responsibility Act of 1996. In section 303 of that Act, it revised the existing detention scheme for aliens subject to removal and imposed a mandatory detention requirement for some of those aliens. It allowed for a transition period to implement mandatory detention. After two years in which the government operation under transitional rules, § 1226(c) took effect in 1998. *Saysana v. Gillen*, 590 F.3d 7, 10 n.2 (1st Cir. 2009). Its first paragraph provides as follows:

> (1) Custody
>
> The Attorney General[1] shall take into custody any alien who—

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[1] The Secretary of Homeland Security is now the official who bears the duties that Congress assigned to the Attorney General in § 1226(c). *See* 6 U.S.C. § 557 (describing catchall transfer-of-duty to Secretary of Homeland Security in the wake of the creation of that Department).

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), A(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

That Mr. Rodriguez and Mr. Khoury committed an offense listed in subparagraphs (A) through (D) is not in dispute, at least not in this case. DHS's initial determination that Mr. Carrera committed one of those offenses was apparently an error, albeit one that DHS did not correct until Mr. Carrera had been confined for four months.

The first paragraph of § 1226(c) does not mandate detention without bond. The next paragraph does, at least in some circumstances:

> (2) Release
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides [that the alien's release is necessary to protect a witness in a major criminal investigation].

In other words, unless he meets an exceedingly narrow witness-protection exception that is not at issue in this case, every alien "described in paragraph (1)" is statutorily ineligible for release from DHS custody in advance of the resolution of his removal proceedings.

By contrast, § 1226 ensures that all aliens who are not "described in paragraph (1)" are eligible for release on bond. Its first paragraph declares that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States," but elaborates that "except as provided in subsection (c)," aliens detained pending removal may be released on bond or conditional parole. § 1226(a)(2).

Plaintiffs contend that they are not subject to mandatory detention because they are not aliens "described in paragraph (1)" because ICE agents took them into custody well after their release from state custody, not "when [they were] released," as paragraph (1) requires. In their view, mandatory detention in accordance with § 1226(c)(2) is available only for aliens who have committed an offense described in paragraphs (A) through (D) *and* who were taken into ICE custody immediately upon their release from state custody. DHS disagrees, taking the position that § 1226(c) mandates detention of any alien who committed an offense described in paragraphs (A) through (D), regardless of when ICE took the alien into custody.

B. Plaintiffs' Statutory Interpretation Claim Is Ripe for a Final Ruling.

Before considering the merits of each party's interpretation of § 1226, the court reviews the procedural posture of this action.

Plaintiffs sued the Secretary of Homeland Security, a host of ICE officials responsible for detaining aliens in the Western District of Washington, and the warden at the NWDC. In addition, they sued the Attorney General in his capacity as head of the Department of Justice, as well as the Director of the Executive Office for Immigration Review ("EOIR"). The EOIR encompasses both the BIA, which is the Justice Department agency responsible for interpreting and applying immigration laws, as well as the immigration courts who preside over alien bond hearings. The Department of Justice and EOIR are Defendants because they abet DHS's execution of its interpretation of mandatory detention. Although aliens in mandatory detention are not entitled to bond hearings, they may receive hearings before an immigration judge where they can contest whether they are properly subject to mandatory detention. 8 C.F.R. § 1003.19(h)(2)(ii); *In re Joseph*, 22 I. & N. Dec. 799, 805 (BIA 1999) (explaining that the "purpose of the regulation . . . is to provide an alien . . . with the opportunity to offer evidence and legal authority on the question whether [DHS] has properly included him within a category that is subject to mandatory detention"). Each of the three Plaintiffs appeared at this hearing, each argued that he was not subject to mandatory detention because DHS did not take him into custody when he was released from state custody, and each received a ruling from an immigration judge that he was nonetheless subject to mandatory detention. Throughout this order, the court uses the term "the government" to apply to Defendants collectively.

Plaintiffs styled their suit as both a petition for writs of habeas corpus on their own behalf and as a suit for declaratory and injunctive relief not only on their own behalf, but on behalf of a class of all aliens who are or will be detained without bond as a result of the government's expansive view of § 1226(c) mandatory detention. They stated two claims for relief: one that the government violates § 1226(c) by subjecting them to mandatory detention; and one that mandatory detention, as the government envisions it, violates the Due Process Clause.

Plaintiffs have not only filed a motion to certify that class, but also a motion for a preliminary injunction that would require the government to provide bond hearings in accordance with § 1226(a) within 30 days of an alien's arrest. A motion for a preliminary injunction requires, among other things, that the Plaintiffs demonstrate that they are likely to succeed on the merits of their claims. The government, not content simply to argue in opposition to the injunction motion that Plaintiffs are unlikely to succeed on the merits, filed a motion to dismiss Plaintiffs' suit for failure to state a claim. Plaintiffs countered by moving for summary judgment and a permanent injunction. The government was prepared to file a cross-motion for summary judgment before the parties reconsidered their more-motions-are-better approach. They agreed that this case turns not on disputed facts, but on a "pure question of law"—specifically the interpretation of § 1226(c). Gov't Mot. (Dkt. # 37) at 3. The parties further agreed that unless the court found a dispute of material fact, it could enter permanent injunctive relief if it resolved that pure question of law in Plaintiffs' favor. Oct. 7, 2013 ord. (Dkt. # 38).

The parties focus virtually all of their attention on Plaintiffs' claim that DHS misinterprets § 1226(c). In their motion to dismiss, Defendants made a cursory effort to target Plaintiffs' Due Process claim, contending that *Demore* has put that claim to rest. Plaintiffs scarcely responded. Although the parties were never explicit, it is possible that their agreement to focus on the "pure issue of law" that their statutory interpretation dispute raises represents an agreement to leave Plaintiffs' Due Process claim for another day. In any event, the parties have done so little to address that claim that the court will not address its merits. For the remainder of this order, the court will ignore Plaintiff's Due Process claim and treat this case as if it raised only a challenge to the government's interpretation of § 1226(c). This order will conclude with instructions to Plaintiffs to indicate whether they still wish to pursue their Due Process claim.

The procedural route to relief thus cleared of obstacles, the court now turns to the issue at the heart of this case: does § 1226(c) permit the government to subject to mandatory detention aliens who it arrested months, years, or (in Mr. Carrera's case) more than a decade after their release from state custody?

III. ANALYSIS

A. Section 1226(c)(2) Unambiguously Conditions Mandatory Detention on DHS Custody That Commences Immediately Upon the End of Non-DHS Custody.

The interpretation of a statute is a question of law whose answer begins with an examination of the plain meaning of the statute. *United States v. Gomez-Osorio*, 957 F.2d 636, 639 (9th Cir. 1992). Words in a statute take on their "ordinary, contemporary, common meaning," unless the statute otherwise defines them. *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012) (citation omitted). The court must read the words of a statute "in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2001); *see also United States v. Morton*, 467 U.S. 822, 828 (1984) ("[W]e do not . . . construe statutory phrases in isolation; we read statutes as a whole."). If the statutory language is unambiguous, and the statutory scheme is coherent and consistent, that is the end of the court's interpretative inquiry. *Miranda*, 684 F.3d 844, 849 (9th Cir. 2012). The parties debate to what extent the court must defer to the BIA's interpretation of § 1226(c) in *Rojas*. But it is settled that a court owes no deference to any agency's statutory interpretation unless the statute fails to clearly express the intent of Congress. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

There are two potential ambiguities in § 1226(c). One is the meaning of the phrase "when the alien is released" in § 1226(c)(1). That phrase might mean something akin to "at the moment of release." It might also mean "at any time after release." The other potential ambiguity arises from the interrelationship of paragraphs (1) and (2) of § 1226(c). Paragraph (2), which is the sole authority for mandatory detention, applies only to "an alien described in paragraph (1)." If an alien "described in paragraph (1)" is merely an alien who has committed one of the offenses listed in subparagraphs (1)(A) through (1)(D), then mandatory detention is available regardless of when DHS takes an alien into custody. That was the view of the BIA in *Rojas.* But if an alien "described in paragraph (1)" is an alien who has both committed one of the enumerated offenses *and* has been taken into DHS custody "when . . . released" from non-DHS custody, the timing of the DHS arrest (and the meaning of "when . . . released") is critical to determining whether the alien is subject to mandatory detention. As the court will soon discuss, neither of these potential ambiguities is an actual ambiguity: the meaning of both phrases is plain in the context of § 1226.

1. No Binding Precedent Dictates this Court's Interpretation of § 1226(c), But Many Courts Have Considered the Issue.

In considering these potential ambiguities, the court does not write on a blank slate. The Ninth Circuit, unfortunately, has yet to interpret § 1226 in a manner that bears on its interpretation in this case. Three other federal appeals courts have. Two of them, in turn, have at least acknowledged the BIA's 2001 interpretation in *Rojas*. There, a majority of the en banc BIA concluded that the phrase "an alien described in paragraph (1)" includes only those aliens described in subparagraphs (1)(A) through 1(D). 23 I. & N. Dec. at 125. The BIA did not decide what "when . . . released" means.

In *Hosh v. Lucero*, 680 F.3d 375, 378 (4th Cir. 2012), the Fourth Circuit purported to defer to the BIA's interpretation of § 1226 in *Rojas*. But it did not. Instead, it interpreted the meaning of "when the alien is released," concluding that although the command to arrest certain criminal aliens "'when . . . released' from other custody connotes some degree of immediacy," it could not "conclude that Congress clearly intended to exempt a criminal alien from mandatory detention and make him eligible for release on bond if the alien is not *immediately* taken into federal custody." *Id.* at 381 (emphasis in original). Alternatively, the *Hosh* court concluded that even if it were to interpret "when . . . released" more stringently, § 1226(c) specifies no consequence for a failure to arrest an alien "when . . . released," and thus does not prohibit mandatory detention for qualifying aliens arrested after their release from non-DHS custody. *Id.* at 381 ("[E]ven if we assume that the statute commands federal authorities to detain criminal aliens at their exact moment of release from other custody, we still conclude that a criminal alien who is detained *after* that exact moment is not exempt from mandatory detention.") (emphasis in original).

In *Sylvain v. Attorney General of the United States*, 714 F.3d 150 (3d Cir. 2013), the Third Circuit focused its attention on whether § 1226(c) conditions mandatory detention on the timing of an alien's arrest. It concluded that it does not. *Id.* at 157 ("Even if the statute calls for detention 'when the alien is released,' . . . nothing in the statute suggests that immigration officials lose authority if they delay."). It noted that the *Hosh* court had not deferred to the BIA's interpretation of "an alien described in paragraph (1)" in *Rojas*, and had instead crafted its own interpretation of "when . . . released" in § 1226(c)(1). *Sylvain*, 714 F.3d at 157 n.9.

Before *Sylvain* and *Hosh* addressed the issue at the heart of this case, the First Circuit addressed a different interpretative question arising from § 1226(c) in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009). The *Saysana* court rejected the BIA's determination that an alien released from custody for an offense described in subparagraphs (1)(A) through (1)(D) *before* the effective date of § 1226(c) could nonetheless be subject to mandatory detention if he was released *after* the effective date from custody for an offense beyond the scope of those subparagraphs. *Id.* at 18. As the court will later discuss, in reaching that conclusion, the *Saysana* court interpreted § 1226(c) in a way that implicitly rejects the BIA's holding in *Rojas*. Indeed, even the BIA, which issued the decision that led to the First Circuit's ruling, interpreted § 1226(c) in a way that implicitly rejects its holding in *Rojas*.

While the Ninth Circuit has yet to address the interpretation of § 1226(c), its district courts have resoundingly rejected the government's position. From the enactment of § 1226(c) in 1996 to the present, almost every district court to consider that position—that the government can arrest aliens who have committed an offense described in § 1226(c)(1) whenever it prefers and subject them to mandatory detention—has rejected it. The Honorable William J. Dwyer of this District was among the first to consider the issue, albeit in the context of transitional rules that applied between the enactment of § 1226(c) in 1996 and its effective date in 1998. *Pastor-Camarena v. Smith*, 977 F. Supp. 2d 1415 (W.D. Wash. 1997). He concluded that the transitional rules made mandatory detention applicable only to aliens taken into federal custody immediately after their release from non-federal custody. *Id.* at 1418. Since then, every judge in this District has reached the same conclusion as to § 1226(c). *E.g.*, *Quezada Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1231 (W.D. Wash. 2004) ("[T]he mandatory detention statute . . . does not apply to aliens who have been taken into immigration custody several months or several years after they have been released from state custody.") (Theiler, M.J.); *Castillo v. ICE Field Office Dir.*, 907 F. Supp. 2d 1235, 1240 (W.D. Wash. 2012) (reaching same conclusion, declining to follow *Hosh*) (Pechman, J.); *Deluis-Morelos v. ICE Field Office Dir.*, No. C12-1905JLR, 2013 U.S. Dist. LEXIS 65862, at *13, 22 (W.D. Wash. May 8, 2013) (reaching same conclusion, declining to follow *Hosh* or *Sylvain*). Other district courts in the Ninth Circuit are in accord. *E.g.*, *Mejia Espinoza v. Aitken*, No. 5:13-cv-512EJD, 2013 U.S. Dist. LEXIS 34919, at *13-16, 21 (N.D. Cal. Mar. 13, 2013) (citing various district court rulings). The court is aware of just one district court within the Ninth Circuit who has ruled to the contrary. *Quiroz Gutierrez v. Holder*, No. 13-cv-5478-JST, 2014 U.S. Dist. LEXIS, at *24-25 (N.D. Cal. Jan. 2, 2014) (following *Sylvain*). Although district courts outside the Ninth

Circuit have usually rejected the government's position, some have not. *See Sylvain*, 714 F.3d at 156 & n.5-6 (listing district courts around the country who have adopted or rejected government's view of mandatory detention); *Gordon v. Johnson*, No. 13-cv-30146-MAP, 2013 U.S. Dist. LEXIS 181980, at *22 (D. Mass. Dec. 31, 2013) (citing cases).

Considering the foregoing precedent as persuasive authority, and paying particular attention to the views of the First, Third, and Fourth Circuits, the court rules as follows. First, the mandatory detention authority provided in § 1226(c)(2) unambiguously applies only to aliens who have been detained "when . . . released" from state custody. The court does not agree with the BIA's determination in *Rojas* that the phrase "alien described in paragraph (1)" is ambiguous, and thus the court does not defer to the BIA's interpretation of that phrase. Second, an alien is detained "when . . . released" only if DHS detains him immediately upon his release from non-DHS custody for an offense specified in subparagraphs (1)(A) through (1)(D). Third, for any alien taken into federal custody at a time other than "when . . . released" from state custody, § 1226 unambiguously requires that the alien be given an opportunity to win release on bond. To summarize, only aliens who have *both* committed an offense specified in subparagraphs (1)(A)-(1)(D) and have been taken into DHS custody immediately upon their release from non-DHS custody for one of those offenses are subject to mandatory detention. The court now explains its conclusions.

2. An Alien "Described in Paragraph (1)" is An Alien Who Has Both Committed a Qualifying Offense and Been Taken Into Federal Custody "When . . . Released" From State Custody.

So far as the court is aware, no court has ever adopted the holding from *Rojas*:

> We construe the phrasing "an alien described in paragraph (1)," as including only those aliens described in subparagraphs (A) through (D) of section [1226(c)(1)], and as not including the "when released" clause.

23 I & N Dec. at 18. That is with good reason, because *Rojas* interprets § 1226(c) in a way that makes the release of the alien from non-DHS custody irrelevant. Were *Rojas* an accurate interpretation of the law, the government could subject to mandatory detention any alien who committed an offense described in subparagraphs (1)(A) through (1)(D). No one, not even the BIA, believes that to be a fair reading of the statute. In *In re Saysana*, 24 I. & N. Dec. 602, 604 (BIA 2008), the BIA explained as follows:

> The "released" language of section [1226(c)(1)] of the Act is not expressly tied to any other language that would clarify whether it refers to release from criminal custody, DHS custody, or some other form of detention. However, we have interpreted this language to include a release from a non-DHS custodial setting after the expiration of the [transitional rules preceding the effective date of the amendments to § 1226].

That explanation was integral to the BIA's holding that an alien who committed an offense described in subparagraphs (1)(A) through (1)(D) was subject to mandatory detention so long as the government detained him after release from *any* non-DHS custody, even custody for an offense beyond the scope of those subparagraphs. *Id.* at 608. But if the BIA believed that it correctly interpreted § 1226(c) in *Rojas*, its ruling in *Saysana* was unnecessary. If *Rojas* was rightly decided, then *Saysana* required nothing more of the BIA than a simple statement that it makes no difference when or whether an alien is released from non-DHS custody or for what crime, because the only precondition to mandatory detention (according to *Rojas*) is commission of a crime listed in subparagraphs (1)(A) through (1)(D).

No court has even suggested that it could decouple mandatory detention from the requirement that an alien first be released from custody. When the First Circuit considered the habeas petition of the alien detained in the wake of *Saysana*, the court squarely rejected the notion that mandatory detention does not depend on a prior release from custody. The court explained that a "natural reading" of § 1226(c) "makes clear that the congressional requirement of mandatory detention is addressed to the situation of an alien who is released from custody for one of the enumerated offenses [of subparagraphs (1)(A) through (1)(D)]." *Saysana*, 590 F.3d at 13. Along the way, it rejected the government's argument that it should be able to detain any alien who committed an offense listed in subparagraphs (1)(A) through (1)(D), even if that offense never resulted in a form of non-DHS custody. *Id.* at 14. It explained that "the plain language of the statute does not render the term 'when released' meaningless as applied to the[] subsections [of § 1226(c)(1)] that do not require a conviction." *Id.* The *Saysana* court recognized that an alien who committed an offense described in subparagraphs (1)(A) through (1)(D) but never came into non-DHS custody would not be subject to mandatory detention. *Id.* It nonetheless declined to adopt the "strained" reading of the statute that the government preferred. *Id.*

Although the *Hosh* court purported to follow *Rojas*, its holding was merely that mandatory detention did not require DHS to "*immediately*" detain an alien upon his release from non-DHS custody. 680 F.3d at 381. Had *Hosh* followed *Rojas*, it would simply have held that release from non-DHS custody is not a precondition of mandatory detention. The *Sylvain* court, acknowledging that the *Hosh* court did not actually follow *Rojas*, declined to "take a stand on th[e]" issue of whether *Rojas* was rightly decided. 714 F.3d at 157 & n.9.

This court concludes that § 1226(c) unambiguously conditions the availability of mandatory detention on an alien's release from non-DHS custody. *Rojas* is entitled to no deference. An alien "described in paragraph (1)" is an alien who both committed a predicate offense *and* was taken into DHS custody "when . . . released" from non-DHS custody.

3. Mandatory Detention Is Available Only When DHS Takes an Alien Into Custody Immediately Upon His Release From Non-DHS Custody.

Having concluded that an alien's release from non-DHS custody is a precondition to mandatory detention, it remains to decide what it means that DHS must take the petitioner into custody "when the alien is released." Reading this phrase without statutory context, it is possible to interpret it in a variety of ways. At one extreme, it could mean "at the moment the alien is released"; at the other, it might mean "at any time after the alien is released." *See, e.g.*, Gov't Mot. (Dkt. # 28) at 9 (offering various dictionary definitions of "when"); *Hosh*, 680 F.3d at 379-80 (reviewing dictionary definitions of "when"). But read in the context of § 1226 as a whole, the latter interpretation cannot stand. The phrase "when . . . released" appears not in a description of conditions of mandatory detention, it appears in a mandate that the government "shall take into custody" any alien who has committed certain offenses. § 1226(c)(1). A mandate is meaningless if those subject to it can carry it out whenever they please. "Take out the trash when you get home," is not at all the same as "take out the trash at any time after you get home, even months or years later." The Fourth Circuit recognized as much in *Hosh*, concluding that the mandate "connotes some degree of immediacy," 680 F.3d at 381, but that it did not require DHS custody to follow immediately after non-DHS custody. This interpretation cannot withstand scrutiny.

That § 1226(c) mandates detention without bond for certain aliens is proof enough that the mandate requires immediate detention. Many courts considering the import of the mandate have looked to the statute's legislative history, observing that Congress was concerned that deportable criminal aliens often committed additional crimes before their removal and that many of them failed to appear for removal hearings. *See Hosh*, 680 F.3d at 381 (citing discussion of § 1226(c)'s legislative history from *Demore*, 538 U.S. at 518). But it is not necessary to know *why* Congress wanted immediate detention of certain aliens without the possibility of bond to know that it did want it. Congress created a non-mandatory detention scheme in § 1226(a). Any deportable alien, including those who committed an offense enumerated in subparagraphs (1)(A) through (1)(D), is subject to non-mandatory detention. That is to say that any alien subject to removal can be taken into custody when DHS prefers. It defies logic to imagine that Congress would have created a parallel system of mandatory detention without bond for certain categories of aliens while permitting the government to give, through inaction, the very unsupervised freedom that the mandate was designed to eliminate. A mandate to take an alien subject to mandatory detention into DHS custody "at some undetermined point after the alien is released from non-DHS custody" is not mandatory detention at all, or at least it is not all the mandatory detention scheme that Congress imposed.

Because the court finds that a requirement of anything other than immediate DHS custody following release from non-DHS custody is inconsistent with the mandatory detention scheme that Congress created in § 1226, the court finds that the requirement that the government take custody "when the alien is released" is a requirement for detention immediately following release from non-DHS custody.

4. The Statute Recognizes that Ordinary Detention is Sufficient for Aliens Who Are Not Taken into DHS Custody "When Released" from Non-DHS Custody.

In the court's view, the strongest argument in favor of the broad mandatory detention scheme that the government advocates is one that the *Hosh* and *Sylvain* courts recognized: better late than never. Put in more lawyerly fashion, a mandate that the government shall act at a specified time is not, without more, a prohibition on acting after that time. *Sylvain*, 714 F.3d at 158. Congress presumably issues mandates for the benefit of a particular segment of the public, and thus it is typically inadvisable to interpret a mandate to deprive that segment of that benefit merely because of "[b]ureaucratic inaction—whether the result of inertia, oversight, or design . . . ." *Id.* at 158.

The so-called "better-late-than-never principle," *Sylvain*, 714 F.3d at 158 (quoting *United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009)), is a sensible canon of statutory interpretation when a contrary interpretation would deprive the intended beneficiaries of the benefits of a statute. That is not so in the case of mandatory detention. By failing to detain an alien subject to mandatory detention immediately after his release from non-DHS custody, DHS has *already* deprived the public of the benefits of mandatory detention. It has allowed an alien to walk free for days, weeks, months, or years, when Congress believes that alien presents such a presumptive risk of danger or flight that he should be immediately confined upon his release from non-DHS custody. Moreover, once an alien has left non-DHS custody, the need for a *pre-*

sumption of danger or risk of flight is reduced or nonexistent. *Saysana*, 590 F.3d at 17 ("[I]t stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be."). In the time since the alien's release, he has either evaded custody or he has not, and he has either demonstrated himself to be a danger to the community or he has not. He has, in other words, given either himself or the government the fodder for a bond hearing.[2] Conditioning mandatory detention on DHS custody immediately upon release from non-DHS custody does not deprive the public of the benefit of detention, because detention remains available via § 1226(a). The DHS's failure to meet that condition deprives the public of whatever additional benefit inures in mandatory detention.

Both the *Hosh* and *Sylvain* courts took guidance on their application of the better-late-than-never principle from *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990). There, the Court considered whether the government lost the authority to detain a criminal defendant without bail when it failed to hold a detention hearing within the time specified by statute. *Id.* at 714-15. The Court concluded that the mandatory hearing deadline did not "operate to bar all authority to seek pretrial detention once the time limit has passed." *Id.* at 718. But consider the distinction between *Montalvo-Murillo* and this case: in *Montalvo-Murillo*, the government would have lost all power to detain the defendant before trial; in this case the government loses nothing, it merely has to present its case for pre-removal detention at a bond hearing. The "better-late-than-never" principle is not itself a mandate, it is merely a specific application of the mandate to construe a statute consistent with its design and purpose. *See id.* at 719. In the context of § 1226, the availability of ordinary bond hearings is a satisfactory alternative to mandatory detention in cases where DHS has already foregone the benefits of mandatory detention through failure to detain the alien upon his release from non-DHS custody.

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[2] The government contends that a deportable alien has no incentive to flee until he knows the government has begun removal proceedings against him. That contention presumes that aliens who have committed crimes listed in subparagraphs (1)(A) through (1)(D) are unaware of the potential immigration consequences. The court is unwilling to make that presumption. Moreover, if Congress had wanted to condition mandatory detention upon the commencement or removal proceedings, it certainly could have done so. Instead, it conditioned it upon a release from non-DHS custody. In any event, the government ignores that an alien is as much a danger to the community before removal proceedings have begun as after.

There is little question that Congress was aware that some aliens who commit offenses described in subparagraphs (1)(A) through (1)(D) would avoid mandatory detention and receive ordinary bond hearings. To begin, as even the BIA acknowledges, Congress allowed all aliens who had committed such offenses and been released prior to the 1998 effective date of the amendments to § 1226(c) to avoid mandatory detention. *Saysana*, 24 I. & N. Dec. at 604; *Saysana*, 590 F.3d at 17 n.6 ("[I]n crafting the new provisions, Congress . . . made explicit that only releases after the effective date would trigger mandatory detention."). This is further proof that Congress viewed a release from non-DHS custody as a prerequisite of mandatory detention, as the court discussed in Part III.A.2, *supra*.

But it also demonstrates that Congress did not view ordinary bond hearings as an invariably unacceptable outcome for aliens who committed the listed crimes. *Saysana*, 590 F.3d at 17 ("Congress was no doubt aware that, under some circumstances, aliens with criminal histories that predate the passage of IIRIRA remain eligible for forms of relief not available to aliens with more recent criminal convictions."). Also escaping mandatory detention are aliens who commit offenses described in subparagraphs (1)(A) through (1)(D), but are not taken into non-DHS custody. For example, aliens who engage in terrorism are "inadmissible under section 1182(a)(3)(B)," as set out in subparagraph (1)(D). But, if DHS arrests an alien who has "under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(III), *before an entity other than the DHS has taken the alien into custody*, the alien must receive an ordinary bond hearing. Congress could have avoided this result with ease by declaring that any alien who commits an offense enumerated in subparagraphs (1)(A) through (1)(D) is subject to mandatory detention. Instead, it tied mandatory detention to a release from non-DHS custody. This is proof enough that Congress was not concerned with a comprehensive mandatory detention scheme tied to certain offenses, but rather concerned with creating a scheme that ensured that aliens who committed certain offenses could be transferred seamlessly from non-DHS custody to mandatory detention. *See Gordon*, 2013 U.S. Dist. LEXIS 181980, at *17 ("The obvious goal was to ensure the direct transfer of potentially dangerous and elusive individuals from criminal custody to immigration authorities.").

For all of these reasons, the court concludes that § 1226(c) unambiguously dictates that only aliens who have committed offenses listed in subparagraphs (1)(A) through (1)(d) *and* have been taken into DHS custody immediately upon their release from non-DHS custody for one of those offenses are subject to mandatory detention.

B. Plaintiffs Have Met the Requirements to Certify a Rule 23(b)(2) Class.

Plaintiffs ask the court to certify a class defined as follows:

> All individuals in the Western District of Washington who are or will be subject to mandatory detention under 8 U.S.C. § 1226(c) and who were not taken into immigration custody at the time of their release from criminal custody for an offense referenced in § 1226(c)(1).

The court modifies that definition slightly, to emphasize that class members are aliens who the government *asserts* are subject to mandatory detention, not necessarily aliens who actually are subject to mandatory detention. It also modifies the phrase "at the time of" to emphasize that DHS custody must occur immediately upon release from non-DHS custody.

> All individuals in the Western District of Washington who the government asserts or will assert are subject to mandatory detention under 8 U.S.C. § 1226(c) and who were not taken into immigration custody immediately upon their release from criminal custody for an offense referenced in § 1226(c)(1).

The court's decision to certify a class is discretionary. *Vinole v. Countrywide Home Loans, Inc.*, 571

F.3d 935, 944 (9th Cir. 2009). Rule 23 of the Federal Rules of Civil Procedure guides the court's exercise of discretion. A plaintiff "bears the burden of demonstrating that he has met each of the four requirements of Rule 23(a) and at least one of the [three] requirements of Rule 23(b)." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 724 (9th Cir. 2007). Rule 23(a) requires a plaintiff to demonstrate that the proposed class is sufficiently numerous, that it presents common issues of fact or law, that it will be led by one or more class representatives with claims typical of the class, and that the class representatives will adequately represent the class. *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982); Fed. R. Civ. P. 23(a)(1)-(4). If a plaintiff satisfies the Rule 23(a) requirements, she must also show that the proposed class action meets one of the three requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Plaintiffs in this case invoke only Rule 23(b)(2), which requires them to show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The government scarcely opposes Plaintiffs' motion for class certification. It does not, for example, dispute that the class is sufficiently numerous. Plaintiffs knew of at least a dozen aliens at the time they moved for class certification who were being detained without a bond hearing as a result of the government's misinterpretation of § 1226(c). It knew of at least a dozen more who had been wrongfully detained in the past two years. Given that most aliens at the NWDC have no counsel, it is safe to assume that there are many more class members. Moreover, the DHS has done nothing to assure Plaintiffs or the court that it will not continue to take into custody aliens after their release from non-DHS custody and subject them to mandatory detention. The class is sufficiently numerous both as to aliens currently subject mandatory detention at the NWDC and as to aliens who the government will subject to mandatory detention at the NWDC. There is no dispute that the joinder of all of these class members as plaintiffs would be impracticable, as Rule 23(a)(1) requires.

Each class member's statutory claim presents questions of law or fact common to the class. The relevant factual questions are the same for every class member. Is the government holding the alien in mandatory detention (or will it seek to do so)? If so, did the government arrest the alien immediately upon his release from non-DHS custody for an offense described in subparagraphs (1)(A) through (1)(D)? The court has already answered the legal question dispositive of each class member's claim: may the government lawfully subject to mandatory detention aliens for whom the answer to the second question is "no"?

The government also contends that Plaintiffs' claims (and the defenses to those claims) are not typical of the class. That argument, however, depends on the government's view that the amount of time between a class member's release from non-DHS custody and DHS's eventual arrest of the class member is relevant to whether he is subject to mandatory detention. It is not. Plaintiffs are typical of class members in the only way that matters: they are in mandatory detention even though DHS did not take them into custody immediately upon their release from non-DHS custody.

The government contends that Plaintiffs are inadequate class representatives for the same reason that their claims are allegedly atypical. That contention does not withstand scrutiny, as the court has just explained. Plaintiffs are, however, atypical of many class members in that they have now secured their release on bond, by virtue of the government's adherence to the six-month limit on mandatory detention from *Rodriguez* and the authority on which *Rodriguez* relies. Even the government acknowledges, however, that at least Mr. Khoury and Mr. Rodriguez may take advantage of an exception to the mootness doctrine that ensures that courts can review "transitory claims" of class representatives. *See Haro v. Sebelius*, No. 11-16606, 2014 U.S. App. LEXIS 61, at *21 (9th Cir. Jan. 2, 2014). Here, the government's adherence to *Rodriguez* ensured that Mr. Rodriguez's and Mr. Khoury's mandatory detention ended after six months, thereby placing them squarely within the transitory claim exception. The court concludes that all three Plaintiffs are adequate class representatives.[3]

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[3] Mr. Carrera's mandatory detention ended after four months when DHS decided that he was not actually subject to mandatory detention, regardless of the government's erroneous interpretation of the mandatory detention statute. Before that, however, he was plainly subject to mandatory detention because of the government's erroneous interpretation of § 1226(c), and his claim is plainly transitory. The court is aware of nothing that would make Mr. Carrera an inadequate class member. Even if the court were mistaken, Mr. Rodriguez and Mr. Khoury can adequately represent the class.

What remains is to consider Rule 23(b)(2), which permits a court to certify a class for injunctive or declaratory relief when that relief would apply equally to all class members. Here, there is no question that all class members will benefit equally from the court's declaration that the government may not subject an alien to mandatory detention via § 1226(c) unless the government took the alien into custody immediately upon his release from custody for an offense described in subparagraphs (1)(A) through (1)(D).

C. The Court Will Impose Only Declaratory Relief At This Time, Although It Will Consider Injunctive Relief If Necessary.

As the court has explained, there are no barriers to entry of final relief on the merits of Plaintiffs' statutory claim. The court queries, however, whether it is necessary to impose a permanent injunction in addition to the classwide declaratory relief that the court has already awarded. The import of the court's declaration is plain: the government violates the law to the extent it continues to subject to mandatory detention aliens who it did not take into custody at the proper time. The court has no reason to expect that the government will not take appropriate action to end its violation of the law.

Accordingly, rather than impose an injunction, the court today will issue only its declaratory ruling. The government will have two weeks from today to assess how it will respond to that declaration. No later than March 26, 2014, it shall meet and confer with counsel for Plaintiffs to reveal its plans for complying with the law. If Plaintiffs are unsatisfied with those plans, or if they believe for another reason that injunctive relief is necessary, they may file a statement of five pages or fewer explaining their position. They must file that statement no later than April 2, 2014. Alternatively, the parties may by the same deadline file a stipulated motion for a permanent injunction or a statement that they agree that injunctive relief is unnecessary to afford complete relief to the class. Finally, the parties shall meet and confer to discuss what, if anything, Plaintiffs wish to do to pursue their Due Process claim to judgment. The parties shall share their views on that subject in a joint statement they file no later than April 2, 2014. They may combine that statement with any other pleading they file on April 2.

IV. CONCLUSION

For the reasons previously stated, the court GRANTS Plaintiffs' motion for class certification (Dkt. # 2) and certifies as class as defined in this order. The court DENIES Defendants' motion to dismiss. Dkt. # 28. The court directs the clerk to TERMINATE Plaintiffs' motion for injunctive relief (Dkt. # 14), without prejudice to renewing a request for a permanent injunction in accordance with this order.

The court issues the following declaratory ruling on behalf of the class: The government may not subject an alien to mandatory detention via 8 U.S.C. § 1226(c) unless the government took the alien into custody immediately upon his release from custody for an offense described in subparagraphs (1)(A) through (1)(D) of § 1226(c).

DATED this 11th day of Mar., 2014.

/s/ RICHARD A. JONES
Richard A. Jones
The Honorable Richard A. Jones
United States District Court Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-16326, 14-16779
D.C. No. 4:13-cv-05754-YGR
Northern District of California, Oakland

MONY PREAP; ET AL., PLAINTIFFS-APPELLEES

v.

JEH JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ET AL.,
DEFENDANTS-APPELLANTS

[Filed: Jan. 11, 2017]

ORDER

Before: KLEINFELD, NGUYEN, and FRIEDLAND, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc and Judge Kleinfeld has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

DATED this 11th day of Mar., 2014.

/s/ RICHARD A. JONES
Richard A. Jones
The Honorable Richard A. Jones
United States District Court Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
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[Filed: Jan. 11, 2017]

ORDER

Before: KLEINFELD, NGUYEN, and FRIEDLAND, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc and Judge Kleinfeld has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-35482
D.C. No. 2:13-cv-01367-RAJ
Western District of Washington, Seattle

BASSAM YUSUF KHOURY; ET AL.,
PLAINTIFFS-APPELLEES

v.

NATHALIE ASHER, FIELD OFFICE DIRECTOR, ICE;
ET AL., DEFENDANTS-APPELLANTS

[Filed: Jan. 11, 2017]

ORDER

Before: KLEINFELD, NGUYEN, and FRIEDLAND, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc and Judge Kleinfeld has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

APPENDIX G

1. 8 U.S.C. 1226 provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

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[1] So in original. Probably should be "sentenced".

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

2. 8 C.F.R. 236.1 provides in pertinent part:

Apprehension, custody, and detention.

(c) *Custody issues and release procedures*—(1) *In general.* (i) **After the expiration of the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104-208, no alien described in section 236(c)(1) of the Act may be released** from custody during removal proceedings except pursuant to section 236(c)(2) of the Act.

* * * * *

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

* * * * *

3. 8 C.F.R. 1236.1 provides in pertinent part:

Apprehension, custody, and detention.

(c) *Custody issues and release procedures*—(1) *In general.* (i) After the expiration of the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104-208, no alien described in section 236(c)(1) of the Act may be released from custody during removal proceedings except pursuant to section 236(c)(2) of the Act.

* * * * *

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to

property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

* * * * *